

NO. 16-1871, 16-2031

In the
United States Court of Appeals
for the
Fourth Circuit

THESIS PAINTING, INC

Petitioner – Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent – Cross-Petitioner

**On Petition for Review from a National Labor Relations Board Decision
NLRB Case No. 5-CA-172905, 364 NLRB No. 53 (2016)**

JOINT APPENDIX

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Petitioner*

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

| | | |
|--------------------------------|---|------------------------|
| THESIS PAINTING, INC. |) | |
| |) | |
| Petitioner/Cross-Respondent |) | |
| |) | |
| v. |) | Nos. 16-1871 & 16-2031 |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Respondent/Cross-Petitioner |) | |

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to authority delegated in Section 102.115 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.115, I certify that the list below fully describes all papers and documents which constitute the record before the Board in Thesis Painting, Inc., Case No. 05-CA-172905, which took official notice of the record in Case No. 05-RC-155713.



Gary W Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

September 12, 2016

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

| | | |
|--------------------------------|---|------------------------|
| THESIS PAINTING, INC. |) | |
| |) | |
| Petitioner/Cross-Respondent |) | |
| |) | |
| v. |) | Nos. 16-1871 & 16-2031 |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Respondent/Cross-Petitioner |) | |

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016, I hand delivered the foregoing document to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC 20570

Dated at Washington, DC
this 12th day of September 2016

FORM NLRB-502 (RC)
(4-15)UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

5-RC-155713

Date Filed

7/9/15

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer

Thesis Painting, Inc.

2b. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code)

7401-D Fullerton Road, Springfield, VA 22153

3a. Employer Representative - Name and Title

Barbara Spyridakis, Owner

3b. Address (If same as 2b - state same)

SAME AS ABOVE

3c. Tel. No.

703-440-5900

3d. Cell No.

3e. Fax No.

703-440-5929

3f. E-Mail Address

Barbara@ThesisPainting.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Painting contractor

4b. Principal product or service

Painting services

5a. City and State where unit is located:

Springfield, VA

5b. Description of Unit Involved

Included: All full-time and regular part-time painters employed by the Employer.

Excluded: All estimators, office-clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

6a. No. of Employees in Unit:

40

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One: ☒ 7a. Request for recognition as Bargaining Representative was made on (Date) 07-09-2015 and Employer declined recognition on or about No reply (Date) (If no reply received, so state).

☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel. No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

None

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: Manual ☒ Mail ☐ Mixed Manual/Mail ☐

11b. Election Date(s):

July 29, 2015

11c. Election Time(s):

11d. Election Location(s):

12a. Full Name of Petitioner (including local name and number)

International Union of Painters and Allied Trades, AFL-CIO, District Council 51

12b. Address (street and number, city, state, and ZIP code)

4700 Boston Way, Lanham, MD 20706

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (If none, so state)

International Union of Painters and Allied Trades, AFL-CIO

12d. Tel. No.

301-918-0182 ext. 117

12e. Cell No.

240-508-9834

12f. Fax No.

301-918-3177

12g. E-Mail Address

SBAiza@Verizon.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title

Sandro Baiza, Marketing Representative

13b. Address (street and number, city, state, and ZIP code)

SAME AS ABOVE

13c. Tel. No.

SAME AS ABOVE

13d. Cell No.

SAME AS ABOVE

13e. Fax No.

SAME AS ABOVE

13f. E-Mail Address

SAME AS ABOVE

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Sandro Baiza

Signature

Title

Marketing Representative

Date

07-09-2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

1-1412892492

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BALTIMORE
JUL 9 2015
5:20 PM

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

In the Matter of:

THESIS PAINTING, INC.,

Employer

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Petitioner.

Case No. 05-RC-155713

**EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND
TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to the Rules and Regulations of the National Labor Relations Board including section 102.69(a) thereof, Thesis Painting, Inc., the Employer in the above-captioned matter hereby files the following Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election in connection with the election conducted by Region 5 on July 31, 2015. Also filed today with these Objections is the Employer's Statement of Position and Evidence in Support of Objections to the Election.

The Employer alleges that the following conduct improperly affected the election and requires that the election be set aside and that a new election be held:

1. During the election, the Union, through its agents and/or representatives, or engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.
2. During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in

improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

Based upon each of the foregoing Objections, or in combination thereof, the Employer respectfully submits that the election must be set aside and a new election held.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin

Mark Eskenazi

Littler Mendelson, P.C.

1150 17th St., N.W.

Washington, D.C. 20036

P: 202-772-2526

F: 202-842-0011

mbaskin@littler.com

meskenazi@littler.com

Attorneys for the Employer

August 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election have been served on the following, this 7th day of August, 2015:

Sandro Baiza, Marketing Representative
International Union of Painters and Allied Trades, AFL-CIO,
District Council 51
4700 Boston Way
Lanham, MD 20706

/s/ Maurice Baskin

**OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

Case No.: 05-RC-155713

THESIS PAINTING, INC.

Employer

And

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51**

Petitioner

Place: Washington, DC

Date: 08/21/15

Pages: 1-83

Volume: 1

OFFICIAL REPORTERS

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Mid-Atlantic Region
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Washington, DC 20005
888-777-6690**

1

UNITED STATES OF AMERICA

2

BEFORE THE NATIONAL LABOR RELATIONS BOARD

3

REGION 5

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In the Matter of:

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8

THESIS PAINTING, INC.,

9

10

Employer,

Case No. 05-RC-155713

11

and

12

13

INTERNATIONAL UNION OF PAINTERS

14

AND ALLIED TRADES, AFL-CIO,

15

DISTRICT COUNCIL 51,

16

17

Petitioner.

18

19

20

The above-entitled matter came on for hearing pursuant

21

to notice, before SCOTT Y. BRYSON, Hearing Officer, at the

22

National Labor Relations Board, 1015 Half Street S.E.,

23

Washington, D.C., on Friday, August 21, 2015, at 9:00 a.m.

24

25

1 A P P E A R A N C E S

2

3 On Behalf of the Employer:

4

5 MAURICE BASKIN, ESQ.

6 Littler Mendelson, P.C.

7 1150 17th Street, N.W., Suite 900

8 Washington, DC 20036

9 (202) 772-2526

10 (202) 318-4048 fax

11 mbaskin@littler.com

12

13 On Behalf of the Petitioner:

14

15 MICHAEL S. MELICK, ESQ.

16 Barr & Camens

17 1025 Connecticut Avenue, N.W., Suite 712

18 Washington, DC 20036

19 (202) 293-9222

20 (202) 293-6893 fax

21

22 Also Present:

23

24 LEISDY BEJARANO, Spanish Interpreter

25

| | | | | | | |
|----|----------------------------|--------|-------|----------|---------|------|
| 1 | I N D E X | | | | | |
| 2 | VOIR | | | | | |
| 3 | WITNESSES | DIRECT | CROSS | REDIRECT | RECROSS | DIRE |
| 4 | | | | | | |
| 5 | Nelson Alfredo Caceres | 11 | 17 | -- | -- | -- |
| 6 | | | | | | |
| 7 | Juan Carlos Carranza Arias | 40 | 44 | -- | -- | -- |
| 8 | | | | | | |
| 9 | Adan Guzman | 54 | 57 | 62 | -- | -- |
| 10 | | | | | | |
| 11 | Jose Raymundo | 63 | 66 | -- | -- | -- |
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| 13 | Sandro Baiza | 69 | 72 | 74 | 74 | -- |
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|----|---------------------|--------------------|---------------|
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| 4 | B-1(a) through 1(h) | | |
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| 5 | B-2 | 9 | 9 |
| 6 | | | |
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| 10 | | | |
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1 P R O C E E D I N G S

2 (Time Noted: 9:20 a.m.)

3 HEARING OFFICER BRYSON: On the record.

4 Good morning, everyone. This is a hearing before the
5 National Labor Relations Board in the matter of Thesis
6 Painting, Inc., Case Number 5-RC-155713, pursuant to the
7 order of the Regional Director dated August 12, 2015. The
8 Hearing Officer conducting this hearing is Scott Bryson.

9 Please be aware that the official reporter makes the
10 only official transcript of these proceeding, and all
11 citations in briefs and arguments, if permitted, must refer
12 to the official record. In the event that any of the
13 parties wish to make off-the-record remarks, requests to
14 make such remarks must be directed to me and not to the
15 official reporter.

16 Also note that statements of reason in support of
17 motions and objections should be specific and concise.
18 Exceptions automatically follow all adverse rulings.
19 Objections and exceptions may, on appropriate request, be
20 permitted to an entire line of questioning.

21 Now, let's see, it appears from the Regional Director's
22 order, a Report of Objections and Notice of Hearing dated
23 August 12, 2015, that this is -- the hearing is held for the
24 purpose of taking evidence concerning Employer Objection 1
25 and Employer Objection 2. Does the Employer agree?

1 MR. BASKIN: Yes.

2 HEARING OFFICER BRYSON: Petitioner?

3 MR. MELICK: Yes.

4 HEARING OFFICER BRYSON: And does everyone have a copy
5 of Objections 1 and 2, the Hearing Officer report and Notice
6 of Hearing. Everybody has copies with them currently?

7 MR. BASKIN: Yes.

8 MR. MELICK: Yes.

9 HEARING OFFICER BRYSON: Okay. Will counsel please
10 state their name for the record? For the Petitioner?

11 MR. MELICK: Michael Melick, spelled -- last name
12 spelled M-e-l-i-c-k.

13 HEARING OFFICER BRYSON: For the Employer?

14 MR. BASKIN: Maurice Baskin of the Littler Mendelson law
15 firm.

16 HEARING OFFICER BRYSON: Are there any other
17 appearances?

18 (No response.)

19 HEARING OFFICER BRYSON: Let the record show no
20 response.

21 I now propose to receive the formal papers. They have
22 been marked for identification as Board's Exhibit 1(a)
23 through 1(h), Exhibit 1(h) being an index and description of
24 the entire exhibit.

25 (Board's Exhibit 1(a) through 1(h) marked for

1 identification.)

2 HEARING OFFICER BRYSON: The exhibit has already been
3 shown to all the parties. Have you guys received it at all?

4 MR. BASKIN: I don't remember seeing it.

5 HEARING OFFICER BRYSON: Electronically?

6 MR. BASKIN: Oh, no.

7 HEARING OFFICER BRYSON: No. Off the record.

8 (Off the record from 9:24 a.m. to 9:31 a.m.)

9 HEARING OFFICER BRYSON: I'll do this again. I now
10 propose to receive the formal papers. They have been marked
11 for identification as Board's Exhibit 1(a) through 1(h),
12 inclusive, Exhibit 1(h) being an index and description of
13 the entire exhibit.

14 The exhibit now has been shown to all parties. Are
15 there any objections to the receipt of these exhibits into
16 the record?

17 MR. MELICK: No objection.

18 MR. BASKIN: No objection.

19 HEARING OFFICER BRYSON: Hearing no objections, the
20 formal papers are received in evidence.

21 (Board's Exhibit 1(a) through 1(h) received in evidence.)

22 HEARING OFFICER BRYSON: Are there any pre-hearing
23 motions made by any party that need to be addressed at this
24 time? Petitioner?

25 MR. MELICK: No.

1 HEARING OFFICER BRYSON: Employer?

2 MR. BASKIN: No.

3 HEARING OFFICER BRYSON: Will each of the parties please
4 identify the issues to be presented for the hearing and
5 their positions on each issue, beginning with the Petitioner
6 -- that should be beginning with the Employer.

7 MR. BASKIN: That's fine.

8 HEARING OFFICER BRYSON: Let's let the Employer go
9 first.

10 MR. BASKIN: Sure. The Employer's position is that the
11 election should be set aside based on one or both of the
12 Objections 1 and 2, Objection 1 being that, summarizing,
13 union agents or representatives engaged in improper
14 electioneering, pressure, or surveillance in close proximity
15 of the polling area, and Objection 2 being that union
16 supporters among the employees engaged in improper
17 electioneering, pressure, or surveillance in close proximity
18 to the polling area. And we will have testimony on both
19 points.

20 HEARING OFFICER BRYSON: Okay. Petitioner?

21 MR. MELICK: Petitioner's statement is as follows: The
22 District Council 51 of the International Union of Painters
23 and Allied Trades maintains that the Employer's objections,
24 both objections to the July 31st election are without merit.
25 In fact, no unlawful electioneering occurred.

1 HEARING OFFICER BRYSON: All right. And before we go
2 any further, I want to -- prior to going on the record,
3 there was a stipulation which is marked Board Exhibit Number
4 2, which was presented to both parties, the Employer and the
5 Petitioner.

6 (Board's Exhibit 2 marked for identification.)

7 HEARING OFFICER BRYSON: I would like to receive the
8 document that you both signed into evidence.

9 MR. BASKIN: No objection.

10 MR. MELICK: No objection.

11 HEARING OFFICER BRYSON: No objection, okay.

12 (Board's Exhibit 2 received in evidence.)

13 HEARING OFFICER BRYSON: Employer, please call your
14 first witness.

15 MR. BASKIN: All right, we'll call our first witness,
16 Nelson Caceres. Should he sit or remain standing?

17 HEARING OFFICER BRYSON: Just remain standing right now.
18 Hold on a second. I've just got to find the swearing in for
19 the interpreter. Okay. Could you stand?

20 THE INTERPRETER: Yes.

21 HEARING OFFICER BRYSON: Could you state your name for
22 the record? Please spell it out.

23 THE INTERPRETER: Okay. My name is Leisdy, L-e-i-s-d-y,
24 last name Bejarano, B, as in boy, e-j-a-r-a-n-o.

25 HEARING OFFICER BRYSON: And you are serving as the?

1 THE INTERPRETER: As the interpreter.

2 HEARING OFFICER BRYSON: Okay. And you are a
3 representative of the National Labor Relations Board; is
4 that correct?

5 THE INTERPRETER: Yes.

6 HEARING OFFICER BRYSON: Please raise your right hand,
7 Leisdy.

8 (Whereupon,

9 LEISDY BEJARANO

10 was duly sworn to interpret the questions from English into
11 Spanish and the answers from Spanish into English to the
12 best of her knowledge and ability.)

13 HEARING OFFICER BRYSON: The witness, would you ask him
14 to please state his name and spell it for the record?

15 THE WITNESS: Nelson Alfredo Caceres, N-e-l-s-o-n
16 A-l-f-r-e-d-o C-a-c-e-r-e-s.

17 HEARING OFFICER BRYSON: Would you raise your right
18 hand?

19 (Whereupon,

20 NELSON ALFREDO CACERES

21 was called as a witness by and on behalf of the Employer
22 and, after having been duly sworn through the Interpreter,
23 was examined and testified as follows:)

24 HEARING OFFICER BRYSON: Please have a seat.

25 Mr. Baskin?

1 DIRECT EXAMINATION

2 Q. BY MR. BASKIN: Who is your employer?

3 A. Thesis Painting.

4 Q. And how long have you worked there?

5 A. Nine years.

6 Q. What is your job at Thesis?

7 A. I'm the lead man.

8 Q. All right, we're going to be talking today about the
9 union election that was held on July 31st. Were you present
10 at the office where the election was held that day?

11 A. Yes, I was there.

12 Q. And just to narrow down, we're talking between 3:00 and
13 5:00 p.m. Were you present at that time?

14 A. Yes.

15 Q. Can you describe for the Hearing Examiner and others the
16 setup, the office where the vote was held?

17 A. It was in the conference room, close to the people that
18 were outside. When we came in, we were in close proximity
19 to the conference room.

20 Q. Let me show you a picture we'll have marked for
21 identification as Employer Exhibit 1(a).

22 MR. BASKIN: Would you mark that?

23 (Employer's Exhibit 1(a) marked for identification.)

24 Q. BY MR. BASKIN: I'm showing you this picture. What is
25 that a picture of?

1 A. It is a picture showing the conference room and the
2 glass that separates the conference room from the outside.

3 Q. So just directing your attention to the left side of the
4 picture where the glass is, is that the front door of the
5 office?

6 A. Yes. It is the main door.

7 Q. And then to the right side of the picture, that door, is
8 that the door to the conference room?

9 A. Yes, sir.

10 Q. Where the vote was held?

11 A. Yes, sir.

12 Q. What's the distance, if you know, from that door of the
13 conference room to the front door?

14 A. 10 to 12 feet.

15 (Employer's Exhibit 1(b) marked for identification.)

16 Q. BY MR. BASKIN: Let me show you another picture, what
17 I've marked as Employer Exhibit 1(b). Is that a picture of
18 the same area from a different angle?

19 A. Yes.

20 Q. The bar on the far right, is that still the door to the
21 conference room?

22 A. Yes.

23 Q. It just shows a more full picture of the front door. So
24 does this photograph -- these two photographs show a true
25 and accurate picture of the front office that we've been

1 talking about?

2 A. Yes.

3 MR. BASKIN: I'll move the admission of these documents,
4 Employer Exhibits 1(a) and 1(b).

5 MR. MELICK: No objection.

6 HEARING OFFICER BRYSON: No objection? The Employer
7 Exhibits 1(a) and 1(b) are now received.

8 (Employer's Exhibits 1(a) and 1(b) received in evidence.)

9 Q. BY MR. BASKIN: Now, on the day of the voting, while the
10 voting was going on, where were you sitting?

11 A. I was sitting in the kitchen. I was in charge of giving
12 the employees their paychecks.

13 Q. Because this was payday?

14 A. Yes.

15 Q. All right. So looking at the pictures again, looking at
16 the pictures, would the kitchen be somewhere behind the
17 person taking the photograph?

18 A. Behind.

19 Q. It's obviously not in the picture. So from where you
20 were sitting, could you see what was going on outside the
21 front door?

22 A. Yes.

23 Q. Well, then what did you see happening while the vote was
24 going on outside the front door?

25 A. There was a lot of people outside.

1 Q. And what were they doing, if anything?

2 A. There was somebody outside talking to the employees.

3 This person was telling them that he had been calling them

4 and they haven't answered.

5 Q. Let's take a step back. You saw some people outside.

6 Were there employees outside?

7 A. Yes.

8 Q. And there were also --

9 A. There were some employees, some that were not employees.

10 Q. Could you, it sounds like you -- well, could you hear

11 what people were saying through the door?

12 A. No.

13 Q. But you just said that he was telling them something.

14 A. Yes, because I went outside to look for someone. That's

15 when I heard that he was telling them that stuff.

16 Q. Now, had you seen those people before, the fellow -- was

17 it one person or two people who were --

18 A. Two people.

19 Q. Two people. Had you seen them before?

20 A. Yes, I have. They worked for the company before. They

21 visited the employees' homes.

22 Q. And they visited on behalf of anyone?

23 A. I have no idea. But supposedly they went and visit the

24 people.

25 Q. Did they visit the jobs?

1 A. Yes.

2 Q. Did you hear what they had to say?

3 A. They were showing their paychecks to show how much they
4 were getting paid.

5 Q. Why were they doing that? Did they say where they were
6 getting paid?

7 A. They said they worked for the Union and that they were
8 getting paid that much money.

9 Q. Were they telling other employees to vote for the Union?

10 A. That's the reason why they had visited.

11 Q. Did they tell people they were there for the Union?

12 A. Yes.

13 Q. Now, going back to the day of the vote, the election,
14 and you said when you were outside you heard what they were
15 saying, tell us again, because I think we may have stopped
16 you in the middle, what were they saying?

17 A. That he had tried calling the people that were outside
18 with him and they hadn't answered him.

19 Q. These people outside, were they on their way into vote?

20 A. Yes.

21 Q. How long did these two people stay out there while the
22 vote was going on?

23 A. When I came in, they were already outside. The
24 elections were about to finish when I saw the last person
25 leave.

1 Q. And you came in before the election started?

2 A. Yes.

3 Q. So they were there almost the whole time of the voting?

4 A. Yes.

5 Q. Now, did some of the people outside or inside wear
6 different colored -- wear black shirts?

7 A. Yes. One of them was wearing a black shirt.

8 MR. BASKIN: Okay, no further questions, but he gets to
9 ask you some.

10 MR. MELICK: And before I do that, I would make a motion
11 for the production of his witness statement pursuant to
12 Board Rule 102.118(b) and (c). Apparently, I assume, he is
13 one of the individuals who submitted an affidavit.

14 HEARING OFFICER BRYSON: Motion to produce his witness
15 statement?

16 MR. MELICK: His witness, yeah, affidavit.

17 HEARING OFFICER BRYSON: As I have no idea and I am not
18 allowed to review any such documents before they are --
19 we're going to have to go to the record. I've got to check
20 if, in fact, one was submitted or not first before I make
21 any sort of ruling, because I don't have access to any of
22 those documents prior, basically, aside from the --

23 MR. MELICK: They don't give you an envelope or
24 something?

25 HEARING OFFICER BRYSON: Not with actual testimony or

1 any sort of affidavit that's either provided -- that was
2 taken by a Board Agent or by a separate party.

3 So we need to go off the record, please.

4 (Off the record from 9:51 a.m. to 10:13 a.m.)

5 HEARING OFFICER BRYSON: Pursuant to the Petitioner's
6 request, an affidavit of Nelson Caceres, one in Spanish and
7 a translation into English, has been provided to the
8 Petitioner for review.

9 Employer, do you have any objection?

10 MR. BASKIN: No objection.

11 HEARING OFFICER BRYSON: I'll present this affidavit now
12 to Petitioner's counsel. We're going to go off the record
13 to allow him to review.

14 (Off the record from 10:14 a.m. to 10:30 a.m.)

15 HEARING OFFICER BRYSON: Petitioner's counsel, go ahead.

16 CROSS-EXAMINATION

17 Q. BY MR. MELICK: Hi, Mr. Caceres. Am I pronouncing your
18 name correctly?

19 A. Yes, sir.

20 Q. On the day of the election, what time did you get to the
21 kitchen?

22 A. About 3:00 in the afternoon.

23 Q. Did you vote in the election?

24 A. Yes. I first voted. Then I went to the kitchen.

25 Q. What time did you vote?

1 A. About 3 o'clock.

2 Q. Were you the first person to vote?

3 A. The second.

4 Q. And then you returned to the kitchen or you went --

5 A. Yes. I just left the conference room, and the kitchen
6 was right there.

7 Q. How long were you in the kitchen?

8 A. Until the election was over.

9 Q. So 5 o'clock, before 5 o'clock?

10 A. At 5 o'clock. When the elections were over, I left.

11 Q. Where did you go after the election concluded?

12 MR. BASKIN: Objection. What's the relevance of that?

13 HEARING OFFICER BRYSON: I'll allow it.

14 THE WITNESS: Outside.

15 Q. BY MR. MELICK: Do you routinely hand out paychecks?

16 A. No, not all the time.

17 Q. Was there a reason you were chosen to hand out paychecks
18 that day?

19 A. No. I can do that on any Friday.

20 Q. Who else hands out paychecks?

21 A. Any of the managers or supervisors.

22 Q. How many managers and/or supervisors are there?

23 A. Seven maybe, eight.

24 Q. How long does it take to hand out paychecks on a normal,
25 non-election day?

1 A. It's not a specific time. It depends.

2 Q. Okay. The time previous to the election, when did you
3 previously hand out paychecks?

4 A. Maybe a month before.

5 Q. How long did it take that time?

6 A. About an hour.

7 Q. And previous to that, when did you hand out paychecks?

8 A. The same, depending on when the people get there.

9 Q. You said about a month before the election you handed
10 out paychecks for one hour.

11 A. Si.

12 Q. When was the time prior to that that you handed out
13 paychecks?

14 MR. BASKIN: Objection. Now we're talking more than, by
15 definition, more than a month before the election. What
16 could that possibly have to do with the election? I'm
17 sorry.

18 HEARING OFFICER BRYSON: Don't say anything.

19 MR. BASKIN: Hold up. I'm objecting here.

20 THE INTERPRETER: No, he has not.

21 MR. BASKIN: That's it.

22 HEARING OFFICER BRYSON: Could you restate your --

23 MR. BASKIN: It's totally irrelevant to the objection.

24 HEARING OFFICER BRYSON: Counsel, where are you going
25 with this? Or how far back do you intend on going?

1 MR. MELICK: Just curious how long it normally takes to
2 hand out paychecks. I think it's relevant to the election
3 day that he was there for 2 hours.

4 HEARING OFFICER BRYSON: I'll allow it. Overruled. Go
5 ahead, answer the question.

6 MR. MELICK: You want it re-asked?

7 HEARING OFFICER BRYSON: Yeah, re-ask him.

8 Q. BY MR. MELICK: A month before the election, you handed
9 out paychecks for 1 hour. When was the time previous to
10 that that you handed out paychecks?

11 A. I can't tell you how long ago. A lot of times, I take
12 them to my house and I tell the people that I have their
13 checks.

14 Q. Employees come to your house to pick up the paychecks?

15 A. Yes.

16 Q. What time do you usually hand out the paychecks?

17 A. They're ready about 2:45.

18 Q. And that's routinely 2:45?

19 A. Yes.

20 Q. So while you were in the kitchen from 3:00 to 5:00, how
21 noisy was the kitchen?

22 A. There were a lot of noise. The representative that was
23 there came out and told them that to be quiet.

24 Q. The representative from the National Labor Relations
25 Board?

1 A. Yes, sir.

2 Q. Told who to be quiet?

3 A. The ones that were making the noise.

4 Q. Were they voting, people who were voting?

5 A. Yes. They were going -- some were going to vote. Some
6 had already voted.

7 Q. When did you go outside to look for someone?

8 A. Somebody, after he voted, asked me about someone else's
9 check, and I told him that I didn't have it. So then I went
10 outside to tell him that he hadn't sent his timesheet.

11 Q. When did that occur though?

12 A. Around 3:45.

13 Q. How long were you outside?

14 A. Maybe 2 minutes.

15 Q. What did you talk about in those 2 minutes?

16 A. I was looking for someone to tell him about paychecks.
17 And I was just listening to what other people were talking
18 about.

19 Q. Did you find the person you were looking for?

20 A. No. He had already left.

21 Q. Did you talk to anyone while you were outside?

22 A. Yes. I asked someone about the person I was looking
23 for, and he told me he left.

24 Q. Who did you talk to?

25 A. One of my co-workers.

1 Q. What's his name?

2 A. Ismael.

3 Q. How do you spell that?

4 THE INTERPRETER: I-s-m-a-e-l.

5 Q. BY MR. MELICK: Last name?

6 A. I don't remember. Argetta, maybe.

7 Q. Did you talk to anyone else while you were outside?

8 A. No, nobody else. When I heard that, I came back inside.

9 Q. Was this the only time you went outside between 3:00 and
10 5:00?

11 A. Yes.

12 Q. Other than this -- other than you voting at 3:00, going
13 outside at 3:45, did you leave the kitchen for any other
14 reason?

15 A. No, I did not leave the kitchen. I just went to the
16 restroom, and that's it.

17 Q. One time to the restroom?

18 A. Yes.

19 Q. You testified earlier that you saw two people who worked
20 for the company before outside; is that correct?

21 A. Yes.

22 Q. Did you see these two people enter the building?

23 A. One came inside to vote.

24 Q. Did the other person come inside to vote?

25 A. No.

1 Q. Who came in to vote? What was his name?

2 A. Adan Guzman.

3 HEARING OFFICER BRYSON: Was the first name Aiden?

4 THE WITNESS: I think is name is Adan.

5 Q. BY MR. MELICK: Who was the other person outside?

6 A. I don't know. I don't remember his name.

7 Q. For this unnamed individual, do you know the last time
8 he worked for Thesis Painting?

9 A. No. I could not tell you.

10 Q. Of these two people, Adan and the unknown individual,
11 which one do you maintain stated to employees outside that
12 he had tried calling them but they had not answered him?

13 A. Adan Guzman.

14 Q. What time did Adan Guzman arrive?

15 A. When I came, he was already there.

16 Q. What time did Adan Guzman leave?

17 A. I couldn't tell you because I left after 5:00.

18 Q. So he was still there at 5:00, after 5:00 p.m.?

19 A. No. I saw him from the kitchen, but I do not remember
20 what time.

21 Q. When did you remember last seeing Adan?

22 A. I think the last time I saw him was about 4 o'clock
23 maybe.

24 Q. So he could have left earlier than 4 o'clock?

25 A. That was the last time that I saw him, when he was

1 telling other people some stuff.

2 Q. The last time that you saw Adan was when he was telling
3 other people some stuff?

4 A. No. The last time that I saw him was when I was looking
5 through the glass.

6 Q. And what time was that?

7 A. Around 4 o'clock.

8 Q. When Adan -- between the time that Adan entered the
9 office, voted, and left the office, how long was he in the
10 office of Thesis?

11 A. He came in and voted, and he stay in the lobby area
12 talking to others for a little bit. Then he left. Then I
13 could see him through the glass.

14 Q. Was he in the office less than 3 minutes?

15 A. Maybe. Like 3 minutes maybe. Maybe.

16 Q. Did you hear what he said to employees when he was
17 inside the office?

18 A. I only heard him say that they had to vote yes.

19 Q. You heard Adan say they had to vote yes inside the
20 office?

21 A. I didn't really hear him, but I heard that's what they
22 were saying.

23 Q. Who is they?

24 A. There were a lot of people there.

25 Q. What were these people saying when Adan was there?

1 A. They were talking. That's when the lady came out and
2 told them to be quiet.

3 Q. So just to be clear, you never heard Adan say to the
4 other employees to vote yes? You never heard that.

5 A. I couldn't tell you. But when I came outside --

6 Q. I'm just talking about inside, just inside.

7 A. I did not hear inside. I couldn't see who was saying
8 what. I just heard.

9 Q. Back to the unknown person, he was an ex-employee of
10 Thesis, correct?

11 A. Yes, yes. He worked for about 2 months.

12 Q. When did he work?

13 A. I couldn't tell you. It's been a while, maybe 2 months
14 ago.

15 Q. He worked 2 months ago for Thesis?

16 A. Yes.

17 Q. So his employment ended 2 months ago?

18 A. Yes. I didn't have the chance to work with him, but he
19 worked for Thesis.

20 Q. Who was his supervisor?

21 A. There are five supervisors. I don't know who he worked
22 for, but he did not work for me.

23 Q. How do you know that this unknown individual was working
24 for the Union?

25 A. Because he was wearing the T-shirt.

1 Q. What T-shirt?

2 A. A black T-shirt.

3 Q. So he was wearing a plain black T-shirt?

4 A. So then he took it off and he left it in the car.

5 Q. So he was wearing a plain black T-shirt, no writing on
6 it at all?

7 A. The T-shirt has the union name in the back.

8 Q. And he took this shirt off?

9 A. Yes. I also saw another person who took it off.

10 Q. Wait, just answer the question. Did he take the shirt
11 off, this unknown -- talking about this unknown person?

12 A. Yes.

13 Q. He took the shirt off?

14 A. Yes.

15 Q. When did he take the shirt off?

16 A. When we were coming in.

17 Q. When coming in at 3 o'clock?

18 A. 3 o'clock.

19 Q. So he took the shirt off before 3 o'clock?

20 A. No. At 3 o'clock, he was by the entrance. He took his
21 shirt off, and then he went outside and left it in his car.

22 Q. What did he put on instead?

23 A. A regular shirt.

24 Q. No union label?

25 A. I didn't notice because I left to grab the checks.

1 Q. What about Adan, was he wearing a black shirt?

2 A. Yes, he had a shirt.

3 Q. With the union name?

4 A. Yes.

5 Q. Did he take his shirt off also?

6 A. No.

7 Q. He kept his shirt on the whole time he was there?

8 A. Yes.

9 Q. So between 3 and 4 o'clock, Adan was at Thesis Painting;
10 is that correct?

11 A. Si.

12 Q. And before 3:00 and 4:00, Adan was wearing a black
13 T-shirt with a union label?

14 A. Yes.

15 Q. For the unknown, this unknown individual, is he in this
16 room?

17 A. No.

18 Q. You do not see him?

19 A. No.

20 Q. Are there any other current co-workers at Thesis,
21 employees who work under you or work under another
22 supervisor you don't know their name?

23 A. No.

24 Q. So you know everyone else's name?

25 A. The supervisors?

1 Q. No, the employees. The people who work under --

2 A. Not the new ones.

3 Q. Not the new ones. Other than the new employees, you
4 know everybody else's name?

5 A. Not the whole name, but --

6 Q. Okay. And this unknown person, he visited employees'
7 homes prior to the election?

8 A. According to my employees, yes.

9 Q. According to your employees, okay. So he never visited
10 you?

11 A. No.

12 Q. What employees -- who told you that the unknown person
13 had visited?

14 A. One named Jose.

15 Q. Do you know his last name? Do you know Jose's last
16 name?

17 A. No.

18 Q. Who else?

19 A. Salvador.

20 Q. His first name is Salvador?

21 A. Si.

22 Q. Last name?

23 A. I don't know the last name.

24 Q. Anybody else?

25 A. Just them.

1 Q. How did Jose and Salvador describe this unknown person?

2 A. They told me that they showed them their checks and they
3 were calling them on the phone.

4 Q. But how do you know it was the same person that visited
5 Jose and Salvador that was outside the door?

6 A. I confirmed that when he was telling them that he had
7 called them several times and they had not answered.

8 Q. So you confirmed it by -- what did you do?

9 A. That he had been calling them to go visit them and they
10 had not answered the phone.

11 Q. This was the day of the election, this conversation?

12 A. Yes.

13 Q. When did Jose tell you this?

14 A. When they visited him. That's when he told me.

15 Q. On the day of the election, when did Jose say that's the
16 guy who visited me?

17 A. No. He had already told me that that person had visited
18 him.

19 Q. But how did you -- it doesn't make -- how did you know
20 the day of the election that this unknown person was the
21 same person who had visited Jose?

22 A. He told me so-and-so has visited me.

23 Q. So the day of the election, Jose did not say this is the
24 person who visited me. He never told you that.

25 A. No.

1 Q. The day of the election, Salvador didn't say that's the
2 guy who visited me?

3 THE INTERPRETER: Mr. Hearing Officer, can I tell him to
4 let me finish before he starts talking? Can I tell him?

5 MR. MELICK: Well, I mean he's answered the question.

6 HEARING OFFICER BRYSON: Yeah, just before, then just
7 let us know --

8 THE INTERPRETER: Can I tell the witness?

9 HEARING OFFICER BRYSON: If there is a pause, then
10 continue with your questions. Just let him finish. So
11 you'll pause then when you're done. Is that fine?

12 THE INTERPRETER: I just want to make sure there is
13 enough time for me to interpret before he --

14 HEARING OFFICER BRYSON: Okay.

15 MR. MELICK: Got you, okay.

16 Q. BY MR. MELICK: So the day of the election, Salvador did
17 not tell you that this unknown person was the person who
18 visited him? Just the day of the election.

19 A. No, he did not tell me.

20 Q. Did Adan, as far as you know -- strike that. Let me
21 rephrase.

22 Did Adan Guzman visit employees' homes prior to the
23 election?

24 A. Yes, that's what Jose told me.

25 Q. Is Jose the only person who told you that Guzman had

1 visited homes?

2 A. Yes. Yes. Jose told me he had visited him. And
3 Salvador told me that the other person had visited him.

4 Q. So Salvador did not tell you that Guzman had visited
5 him?

6 A. No. Jose told me.

7 Q. So the only person that Guzman visited was Jose?

8 MR. BASKIN: Objection.

9 MR. MELICK: That you know?

10 HEARING OFFICER BRYSON: Don't answer. Objection?

11 MR. BASKIN: Well, he changed his question. He made it
12 sound like he had testified to everybody they visited, so I
13 objected to it.

14 MR. MELICK: I can rephrase the question.

15 MR. BASKIN: Mischaracterization of the testimony.

16 HEARING OFFICER BRYSON: Got you.

17 MR. BASKIN: If he wants to rephrase, that's fine.

18 HEARING OFFICER BRYSON: Rephrase. Just forget the last
19 question, and he's going to rephrase, and then interpret.

20 Q. BY MR. MELICK: Did any other employee besides Jose tell
21 you that Guzman visited them?

22 A. Only Jose and Salvador.

23 Q. So Jose and Salvador both told you that Guzman visited
24 them?

25 A. No. Jose told me Guzman visited him. And Salvador told

1 me another person had visited him.

2 Q. Did Jose tell you that another person had visited him?

3 A. There were two people, but he did not tell me the names.

4 He did not tell me who they were.

5 (Pause.)

6 Q. BY MR. MELICK: Is the Salvador that you've been

7 referring to, is his last name Rodriguez possibly?

8 A. There are two Salvadors.

9 Q. Or is it Mendez?

10 A. I can't remember the last name.

11 Q. This gentleman works under you, this Salvador?

12 A. No. There is a few groups. There are about seven or
13 eight groups.

14 Q. So who does Salvador work for, work under?

15 A. The one in charge is Jorge.

16 Q. So this Salvador works under Jorge?

17 A. Yes.

18 Q. Do you know if Salvador told Jorge what he told you?

19 A. No, I don't know. That's personal.

20 Q. Are you close with this Salvador?

21 A. No, only work related. That's it.

22 Q. I'm just curious why were you -- why was Salvador
23 telling you about who was visiting him at home?

24 A. Because we were talking about the guys from the Union
25 were visiting, visiting them at their homes.

1 Q. Okay. And Jose, is it possible his last name is Viera?

2 A. Yes.

3 Q. It's Jose Viera that you're talking about?

4 A. Yes, sir. That's the last name.

5 (Pause.)

6 Q. BY MR. MELICK: Other than Adan and the unknown person,
7 was there anyone else wearing the black shirt?

8 A. No, only them two, nobody else.

9 Q. So there were no current employees at the time of the
10 election that were wearing black shirts?

11 A. During the vote, I was not there. I only saw him when
12 he went -- when he took his shirt off and he went outside.

13 Q. Who?

14 A. Ivan.

15 Q. So now there is another person, Ivan?

16 A. Adan.

17 Q. Oh, Adan.

18 A. Um-hum.

19 Q. Okay. So there is just two people who were wearing the
20 black shirt?

21 A. Yes, two.

22 HEARING OFFICER BRYSON: Just hold on one second here.
23 Can we, just to clarify this, can anybody, whether it's the
24 Employer or the Petitioner, this guy's name, Mr. Guzman,
25 what's his first name? Is it Adam? Is it Adan? Is it

1 Ivan?

2 MR. MELICK: Adan, A-d-a-n, I believe.

3 UNIDENTIFIED SPEAKER: I believe right there.

4 MR. GUZMAN: Yeah, I am.

5 HEARING OFFICER BRYSON: Can you spell your first name
6 for us?

7 MR. GUZMAN: A-d-a-n.

8 HEARING OFFICER BRYSON: A-d-a-n?

9 MR. GUZMAN: Yeah.

10 HEARING OFFICER BRYSON: Okay, thank you. I just want
11 to make sure that we get your name, especially if you're in
12 the hearing now. All right, go ahead.

13 Q. BY MR. MELICK: Prior to the election, did anybody from
14 the Union visit you at home?

15 A. Nobody.

16 Q. So the day of the election, you saw the unknown
17 individual that we've been referring to, the guy you don't
18 know his name?

19 A. Si.

20 Q. When was the previous time you had seen him?

21 A. A month before, when he brought his check.

22 Q. You saw him a month before to pick up his check?

23 A. Yes, to pick up his check.

24 Q. When was the time prior to that that you saw this
25 unknown person?

1 A. I saw him in the office. I didn't really talk to him
2 much. He doesn't work under me.

3 Q. You saw him at Thesis' office, though?

4 A. Yes.

5 Q. Where do you go for jobs? When you're working for
6 Thesis, where do you go?

7 A. Everywhere.

8 Q. Just give me three examples.

9 A. Alexandria, Rockville, and Washington.

10 Q. What do you do on the job?

11 A. I'm a lead man.

12 Q. You're painting commercial buildings?

13 A. Yes, commercial, apartments.

14 Q. Okay. Did you ever see this unknown individual at any
15 of these jobs?

16 A. No.

17 Q. Did you ever see Adan at any of these jobs?

18 A. Yes. He has worked for me. But I've never seen him
19 wearing any union stuff at work.

20 Q. So the only time you saw Adan, other than the voting
21 day, was when he was working for Thesis; is that correct?

22 A. Yes. Jose told me he was the one that have been
23 visiting them.

24 Q. Right. I'm talking that you've ever seen on a job.

25 A. No, I have never seen him.

1 (Pause.)

2 Q. BY MR. MELICK: Do you recall seeing Jose Noe Raymundo
3 the day of the election?

4 A. Yes.

5 Q. You know who this individual is?

6 A. Yes.

7 Q. Do you see him today? He's here?

8 A. Yes.

9 Q. Okay. When did you see him?

10 A. When I came in, he was wearing the union shirt. And
11 then he went back and took it off.

12 Q. But you testified a few minutes ago that there are only
13 two guys wearing the black shirts, Adan and the unknown guy.

14 A. That's right.

15 Q. So now there is a third person wearing a union shirt?

16 A. To me, Jose Noe doesn't count because he was not inside,
17 because he was inside the election.

18 Q. So was -- just even though I've asked this in a
19 different way, I have to ask it again. Was there anyone
20 else in the office wearing a black shirt with the Union --

21 A. Not inside.

22 Q. Just Jose Raymundo? Noe Raymundo?

23 A. Yes, but before -- he was coming in at 3:00 with me,
24 because he was going to be a witness for the election.

25 Q. He was a union observer, correct?

1 A. Yes.

2 Q. Did you see the NLRB representative the day of the
3 election? Do you know who it was?

4 A. The lady that was there?

5 Q. Yeah.

6 A. Um-hum.

7 Q. Did you see her talk to Jose about the shirt?

8 A. No.

9 Q. When did you see Jose take the shirt off?

10 A. When I came in, he was parked outside. He had his
11 shirt. When he was coming in, I suppose somebody told him
12 to take it off. I suppose. That's my belief.

13 Q. So when he was outside in the parking lot, what shirt
14 was he wearing?

15 A. He had a white shirt with a union logo in the back.

16 Q. He had a white shirt with the union logo?

17 A. Yes.

18 Q. Okay. And he changed it to what?

19 A. For a shirt with -- like that one.

20 Q. There's no union label on the shirt?

21 A. No.

22 Q. Okay. So he was never wearing a black shirt?

23 A. When he was inside the voting area, no.

24 Q. When he was inside the voting area, the whole time he
25 was just wearing a regular shirt, non-union shirt?

1 A. Regular, a regular shirt.

2 Q. At no time when Jose was in the office did you see him
3 wearing a shirt with a union label?

4 A. Not inside. Not inside the election. He took it off
5 before he came inside.

6 Q. Did you talk to Noe Raymundo after the election?

7 A. Yes. I was with the ones in charge of the groups. And
8 he arrived, and he was trying to make fun of us.

9 Q. What did you say to him?

10 A. That I was talking to the employees, and there was no
11 time to talk, to please leave us alone and go to his car.

12 Q. Did you ever curse at Noe Raymundo after the election?

13 MR. BASKIN: Objection. It's irrelevant what happened
14 after the election.

15 HEARING OFFICER BRYSON: Sustained.

16 MR. BASKIN: He sustained the objection.

17 HEARING OFFICER BRYSON: I sustained, yes. I sustained
18 it, the objection. Don't answer the question.

19 MR. MELICK: Okay. That is all my questions for now.

20 MR. BASKIN: Just one minute?

21 HEARING OFFICER BRYSON: Just tell him they're going to
22 look over -- for right now just remain seated, and then he
23 might have some other questions to ask you. Just stay right
24 there.

25 MR. BASKIN: I don't have any further questions.

1 HEARING OFFICER BRYSON: Okay, thank you. You're
2 released.

3 (Witness excused.)

4 MR. BASKIN: Call Juan Carlos Carranza Arias.

5 COURT REPORTER: I do have to add that I was struggling,
6 as was she, when everyone was talking over each other. So
7 the witness really needs to wait until she finishes the
8 question and not talk over her. I can't hear it.

9 HEARING OFFICER BRYSON: Can you just explain that to
10 him real quick. And make sure that you --

11 THE INTERPRETER: Finish.

12 HEARING OFFICER BRYSON: You finish, like don't have him
13 respond at all prior to you completing whatever you are
14 translating.

15 (Pause.)

16 HEARING OFFICER BRYSON: All right. Please raise your
17 right hand.

18 (Whereupon,

19 JUAN CARLOS CARRANZA ARIAS
20 was called as a witness by and on behalf of the Employer
21 and, after having been duly sworn through the interpreter,
22 was examined and testified as follows:)

23 HEARING OFFICER BRYSON: Please have a seat. Please
24 state your name and spell it for the record, please.

25 THE WITNESS: Juan Carlos Carranza Arias.

1 THE INTERPRETER: Juan Carlos Carranza Arias, J-u-a-n
2 C-a-r-l-o-s C-a-r-r-a-n-z-a A-r-i-a-s.

3 HEARING OFFICER BRYSON: Go ahead.

4 DIRECT EXAMINATION

5 Q. BY MR. BASKIN: Thank you. I have some questions for
6 you. Who is your employer?

7 A. I work for Thesis.

8 Q. What is your job at Thesis?

9 A. I am a lead man.

10 Q. Do you recall the election that we've been talking about
11 today, July 31st?

12 A. Yes.

13 Q. Between 3:00 and 5:00 p.m., did you attend the election?
14 Were you there?

15 A. Yes.

16 Q. Let me show you the photographs just to establish this
17 is the office setup, correct?

18 A. Yes.

19 MR. BASKIN: I'm showing Exhibits 1(a) and (b).

20 HEARING OFFICER BRYSON: Okay.

21 MR. BASKIN: Same exhibits as before.

22 Q. BY MR. BASKIN: And just to establish, do you agree the
23 distance from the conference room where the vote was to the
24 front door was how many feet?

25 A. Approximately 10 to 12 feet.

1 Q. Thank you. Now, when did you come into vote that day?

2 A. It was around 3:05, 3:10.

3 Q. Were there people outside the front door when you
4 arrived?

5 A. Yes. There were other people.

6 Q. Can you tell us the type of people you saw there, I mean
7 employees, non-employees?

8 A. There were employees and non-employees.

9 Q. Where were they in the pictures, like where were they
10 standing? I'm showing you the pictures.

11 A. In front of the main door of the building.

12 Q. Which is on the left-hand part of Employer Exhibit 1(a),
13 and it's the door under the exit sign on Exhibit 1(b),
14 that's the front door?

15 A. Yes, to the left side.

16 Q. Okay. The people who were not employees, do you know
17 who they were?

18 A. I don't know them.

19 Q. Were they wearing any different shirts?

20 A. No.

21 Q. Did you know if these people, if any of the people in
22 front of the front door worked for the Union?

23 A. Yes. One, one of them.

24 Q. Which one, or do you know his name?

25 A. Yes.

1 Q. And what was his name?

2 A. Adan Guzman.

3 Q. How did you know he worked for the Union?

4 A. I heard that he works for a company named Federal.

5 Q. And?

6 A. And I know that's a union company.

7 Q. Okay. Did you hear that he came around to tell people
8 that they should support the Union?

9 A. I really did not hear. I saw that after he voted, he
10 stayed.

11 Q. And?

12 A. He went to the parking lot. He was talking to one of
13 the employees. I approached him to see what was going on,
14 and he changed the subject of the conversation.

15 Q. He was right outside the front door when you came in?

16 A. Yes. He stay outside talking to employees.

17 Q. All right. So then you voted?

18 A. Yes. When I came in between 3:05 and 3:10, I voted.

19 Q. And then you went back out?

20 A. Yes.

21 Q. Was Mr. Guzman still there?

22 A. Yes.

23 Q. Then where did you go? Where did you go?

24 A. I was there for about half an hour. Then I went to get
25 something to eat.

1 Q. Was Mr. Guzman still there the whole time?

2 A. I came back around 4:00, and he wasn't there anymore.

3 Q. One moment.

4 (Pause.)

5 MR. BASKIN: No further questions. But he gets to ask
6 you some.

7 MR. MELICK: Same motion for production of the witness
8 affidavit.

9 HEARING OFFICER BRYSON: This is a one-page document.
10 This affidavit has been provided in English. It is dated
11 August 6th.

12 MR. MELICK: Thank you.

13 HEARING OFFICER BRYSON: Do you have a copy of the other
14 affidavit I gave you?

15 MR. MELICK: Yeah, I marked it up.

16 HEARING OFFICER BRYSON: That's fine. I'll just need it
17 before --

18 MR. MELICK: Oh, I don't get to keep it?

19 HEARING OFFICER BRYSON: No, before we close.

20 MR. MELICK: Are you sure I don't get to keep it?

21 HEARING OFFICER BRYSON: I'm almost positive, but I'll
22 double-check.

23 MR. MELICK: Only because it's evidence and if I'm -- if
24 I have to write briefs in this case, it's --

25 HEARING OFFICER BRYSON: I'll double-check, but I'm

1 almost positive. You can keep it right now, but before we
2 leave.

3 MR. MELICK: Yep.

4 HEARING OFFICER BRYSON: How long do you think you'll
5 need?

6 MR. MELICK: At least, I don't know, 10 or 15 minutes,
7 maybe less. This is the first time I'm hearing this stuff.

8 HEARING OFFICER BRYSON: Yes. Are you in agreement with
9 a 15-minute break, at max?

10 MR. BASKIN: 15 is all right.

11 HEARING OFFICER BRYSON: Let's say 11:45. Off the
12 record.

13 (Off the record from 11:30 a.m. to 11:46 a.m.)

14 MR. MELICK: Is it Mr. Carranza or Mr. Arias?

15 THE WITNESS: Carranza.

16 CROSS-EXAMINATION

17 Q. BY MR. MELICK: I just want to be sure, you saw only one
18 non-employee on the company's premises the day of the
19 election, correct?

20 A. Two.

21 Q. You testified prior that you only saw one.

22 A. I wasn't asked how many.

23 Q. Who was the second employee?

24 A. From the Union?

25 Q. Who was the second non-employee?

1 A. I don't understand the question.

2 Q. You just testified that there were two non-employees on
3 the company's premises the day of the election. Who was the
4 second person?

5 A. The one that was representing the Union.

6 Q. As a union observer -- sorry, as an election observer,
7 Noe Raymundo?

8 A. Yes. Yes.

9 Q. So there was Noe Raymundo and Adan Guzman?

10 A. Yes.

11 Q. No other non-employees of Thesis on the day of the
12 election?

13 MR. BASKIN: Objection. You're asking that he saw?

14 MR. MELICK: Yes, that you saw.

15 HEARING OFFICER BRYSON: What was the question? What
16 was the question again?

17 MR. MELICK: Yeah.

18 Q. BY MR. MELICK: On the day of the election, you saw only
19 two non-employees on the company's premises; is that
20 correct?

21 A. I think I got confused in the beginning. You didn't
22 explain to me what were you asking.

23 Q. So there is no -- you're not answering the question?

24 A. I need you to explain to me more. There were a lot of
25 employees there.

1 HEARING OFFICER BRYSON: All right, let's -- do you mind
2 if I?

3 MR. MELICK: Please.

4 HEARING OFFICER BRYSON: I think if I can explain it,
5 how many people did you see who were not, who were not
6 actually working for Thesis on the day of the election?
7 Like who was not their -- who was not employed by the
8 Employer?

9 THE INTERPRETER: How many people he saw?

10 HEARING OFFICER BRYSON: Yeah, maybe that was too long.
11 How many people did he see that were not employed on the day
12 that the election took place?

13 THE WITNESS: I saw a lot of people. I only recognized
14 two. I can't tell you how many people, because I didn't
15 have time to count them.

16 Q. BY MR. MELICK: So you don't know how many non-employees
17 there were?

18 A. No.

19 Q. Did Adan Guzman ever visit you at your home?

20 A. Personally, I want to make something real clear.

21 HEARING OFFICER BRYSON: Well, hold on, hold on. Don't
22 answer. Don't speak right now.

23 Can we go off the record?

24 (Off the record from 11:50 a.m. to 11:53 a.m.)

25 HEARING OFFICER BRYSON: Continue, please.

1 Q. BY MR. MELICK: Did Adan Guzman ever visit you at your
2 home?

3 A. No.

4 Q. Did Noe Raymundo ever visit you at your home?

5 A. No.

6 Q. Both Adan Guzman and Noe Raymundo voted in the election;
7 is that correct?

8 HEARING OFFICER BRYSON: Again, make sure that -- just
9 for the reporting, just let her finish.

10 COURT REPORTER: I didn't get his response.

11 HEARING OFFICER BRYSON: Respond again, please. She
12 didn't get your response.

13 THE WITNESS: Yes.

14 Q. BY MR. MELICK: Where do you do your work for Thesis?
15 Where are the jobs?

16 A. I don't have a specific place. Regularly, I am in
17 Virginia.

18 Q. On these jobs, did Adan ever work for you? Was Adan
19 ever present on these jobs, Adan Guzman?

20 A. No.

21 Q. Was Noe Raymundo ever present on these jobs?

22 A. I don't really know. I only have the small jobs.

23 Q. Well, did Noe work on those jobs or not?

24 A. When he work for Thesis?

25 Q. Yeah.

1 A. Yes, he worked under me -- I mean with me, he worked
2 with me.

3 Q. On these jobs, did you ever see Adan Guzman other than
4 as an employee?

5 A. No.

6 Q. Outside of Noe Raymundo working as an employee for
7 Thesis, did you ever see him on these jobs?

8 A. No.

9 MR. MELICK: I'm going to mark this as Union Exhibit 1.
10 (Petitioner's Exhibit 1 marked for identification.)

11 Q. BY MR. MELICK: Mr. Carranza, looking at the document in
12 front of you, do you recall writing this affidavit?

13 A. Yes, more or less.

14 Q. Did you write the affidavit yourself?

15 A. Yes.

16 Q. You wrote all these words yourself?

17 A. Yes, in Spanish.

18 MR. MELICK: Was there a Spanish affidavit attached to
19 this?

20 HEARING OFFICER BRYSON: Not that I know of. I was only
21 provided with whatever you received.

22 MR. MELICK: All right.

23 Q. BY MR. MELICK: Can you look at -- and before I go on --
24 actually, look at Paragraph 4 in the statement. Just read
25 it to yourself.

1 A. Want me to read it?

2 Q. Yeah, read it to yourself, Paragraph 4.

3 HEARING OFFICER BRYSON: Just to yourself. Don't read
4 it aloud.

5 THE WITNESS: Okay.

6 Q. BY MR. MELICK: Do you understand the statement in
7 English?

8 A. Yes.

9 Q. You do, okay.

10 COURT REPORTER: That was yes?

11 THE INTERPRETER: Yes.

12 Q. BY MR. MELICK: Is this statement still true?

13 A. Yes.

14 Q. So who are the two agents, the union agents that were
15 talking to the voters?

16 A. One of them, Adan Guzman.

17 Q. And who was the other?

18 A. I do not know the other person's name.

19 Q. So now there's at least three non-employees on the day
20 of the election?

21 A. There were more than three. I only recognized two.

22 Q. You only recognized two people. And how many -- let's
23 just do it again. How many non-employees were there that
24 you saw?

25 MR. BASKIN: Well, I object. This is asked and

1 answered. He said there were a lot of people. He didn't
2 know all their names. And that's taken care of.

3 MR. MELICK: All right, that's fine. That's fine.

4 HEARING OFFICER BRYSON: Sustained. Don't answer that.

5 Q. BY MR. MELICK: Mr. Carranza, let's take a look at
6 Paragraph 5.

7 A. Okay.

8 Q. Is this statement still true?

9 A. Part of it, yes.

10 Q. What part is not true?

11 A. The part where it says they changed to the company's
12 white T-shirt.

13 Q. Where they changed from the white T-shirts?

14 A. One of them was wearing a black T-shirt. He took it off
15 and he put on a regular T-shirt.

16 Q. Was that the only person wearing a union T-shirt?

17 A. Yes.

18 Q. That was Adan Guzman or Noe Raymundo?

19 A. Noe Raymundo. Noe Raymundo changed his T-shirt.

20 Q. Okay. And Adan was never wearing a black T-shirt?

21 A. I didn't really notice the color of his T-shirt.

22 Q. So what employees were standing in the lobby area?

23 A. Thesis employees.

24 Q. That's my mistake. What employees in the lobby area
25 changed their -- strike that, forget it.

1 So you witnessed somebody telling the voters how to
2 vote?

3 A. Not really.

4 Q. Please take a look at Paragraph 6.

5 A. Okay.

6 Q. Is that statement still true?

7 A. Yes.

8 Q. So who are the men that you're referencing that visited,
9 sorry -- yeah, that visited homes?

10 A. Adan and Noe.

11 Q. But they didn't visit you at your home, correct?

12 A. No, not me.

13 Q. How do you know that Adan and Noe visited homes?

14 A. Because I heard it from the employees that they were
15 visiting people's homes, showing their checks.

16 Q. And who are these people that you saw talking to
17 painters outside your jobs?

18 A. I never saw them. I only heard that they gather the
19 employees on a specific job.

20 Q. So you never actually saw any union people outside the
21 jobs?

22 A. No.

23 MR. MELICK: No more questions.

24 MR. BASKIN: One second.

25 HEARING OFFICER BRYSON: So, Petitioner, no more

1 questions?

2 MR. MELICK: No more questions.

3 HEARING OFFICER BRYSON: Mr. Baskin?

4 MR. BASKIN: Nothing further.

5 MR. MELICK: Oh, sorry, I would like to move this into
6 evidence as Union Exhibit 1.

7 HEARING OFFICER BRYSON: Are there any objections?

8 MR. BASKIN: No objection.

9 HEARING OFFICER BRYSON: Okay.

10 COURT REPORTER: Moved in?

11 HEARING OFFICER BRYSON: Hold on one second. Let me
12 just read something here real quick.

13 Let's go off the record.

14 (Off the record from 12:08 p.m. to 12:10 p.m.)

15 HEARING OFFICER BRYSON: Before we went off the record,
16 the Petitioner motioned to enter the affidavit of
17 Mr. Carranza. It was titled Union Exhibit 1. I am not
18 going to allow that to be entered as an exhibit.

19 MR. MELICK: And the reason?

20 HEARING OFFICER BRYSON: The reason is I think that the
21 use of the affidavit here is just meant for cross-
22 examination and we're not going to be -- I assume we're not
23 going to be writing briefs anyway, I mean relying on it.

24 MR. MELICK: If we're not writing briefs, obviously I
25 don't need it.

1 HEARING OFFICER BRYSON: And that was the direction I
2 got from the Regional Office.

3 MR. BASKIN: Did the Regional Office give you direction
4 on the briefs also?

5 HEARING OFFICER BRYSON: No, I didn't ask specifically,
6 but I know what it is most likely. I can check, but I'm
7 sure the answer is going to be no for post-hearing election
8 -- or post-hearing briefs, post-election hearing briefs.

9 MR. MELICK: There will be no briefs?

10 HEARING OFFICER BRYSON: Yes, no briefs.

11 MR. MELICK: Okay, thank you.

12 HEARING OFFICER BRYSON: I'll just clarify that. We're
13 not going to enter that exhibit. Thank you.

14 (Petitioner's Exhibit 1 rejected.)

15 HEARING OFFICER BRYSON: And you're free to go. Thank
16 you.

17 THE INTERPRETER: He needs to go outside to his car. Do
18 you want me to take him real quick?

19 MR. BASKIN: He's actually released to go.

20 THE INTERPRETER: Yeah, but I still need to escort him
21 downstairs.

22 HEARING OFFICER BRYSON: She still needs to --
23 (Witness excused.)

24 HEARING OFFICER BRYSON: Go off the record. I'm sorry.
25 (Off the record from 12:13 p.m. to 12:15 p.m.)

1 HEARING OFFICER BRYSON: Petitioner, your witness,
2 please?

3 MR. MELICK: Call Adan Guzman.

4 HEARING OFFICER BRYSON: Please remain standing. Raise
5 your right hand.

6 (Whereupon,

7 ADAN GUZMAN

8 was called as a witness by and on behalf of the Petitioner
9 and, after having been duly sworn through the Interpreter,
10 was examined and testified as follows:)

11 HEARING OFFICER BRYSON: Please have a seat. Please
12 have him state his name and then spell it.

13 THE WITNESS: Adan Guzman, A-d-a-n G-u-z-m-a-n.

14 HEARING OFFICER BRYSON: Was that Z?

15 THE WITNESS: Guzman. Yes.

16 HEARING OFFICER BRYSON: Okay, go ahead.

17 DIRECT EXAMINATION

18 Q. BY MR. MELICK: Hi, Mr. Guzman. Where are you currently
19 employed?

20 A. At this time?

21 Q. Yes.

22 A. Federal Union -- just Federal.

23 Q. Is it called Federal Painting?

24 A. Federal Painting, yes.

25 Q. Have you ever been employed by District Council 51 of

1 the Painters Union? Have you ever been employed by the
2 Union in this case?

3 A. No.

4 Q. Did you work for Thesis Painting?

5 A. Yes.

6 Q. When did you work for Thesis approximately?

7 A. I worked for about a year with them.

8 Q. When did you start?

9 A. I can't remember.

10 Q. Okay. When did your employment end?

11 A. Two months ago, maybe two and a half months, something
12 like that.

13 Q. Did you vote in the election on July 31st, the union
14 election?

15 A. Yes.

16 Q. When did you arrive at Thesis?

17 A. I arrived at the exact time -- I mean I can't remember
18 the exact time, maybe around 3:00.

19 Q. Do you recall did you vote as soon as you arrived?

20 A. Yes.

21 Q. When did you leave Thesis?

22 A. I voted and I left.

23 Q. How long in total were you at Thesis Painting?

24 A. Maybe 10 minutes.

25 Q. 10 minutes, okay. After you voted, did you spend any

1 time inside the Thesis office?

2 A. No.

3 Q. Before you voted, did you spend any time inside the
4 Thesis office?

5 A. No.

6 Q. After you voted, where did you go?

7 A. I went home.

8 Q. After you left the Thesis office, did you spend time
9 outside in the parking area or right outside the building?

10 A. What I remember, after I voted, I left. I saw some
11 people. I shook their hands and then I left right away.

12 Q. Were you wearing any sort of shirt with a union insignia
13 or label on the shirt?

14 A. No.

15 MR. MELICK: No questions at this time.

16 HEARING OFFICER BRYSON: Mr. Baskin?

17 MR. BASKIN: First of all, is there a statement that you
18 have for him? Do you have any statement prior to this for
19 him? I'm assuming not.

20 HEARING OFFICER BRYSON: Oh, no. No, I didn't take one
21 from them.

22 MR. BASKIN: Okay. Give me 5 minutes?

23 HEARING OFFICER BRYSON: Can we go off the record,
24 please?

25 (Off the record from 12:23 p.m. to 12:28 p.m.)

1 CROSS-EXAMINATION

2 Q. BY MR. BASKIN: I'm counsel for the Employer. I'm going
3 to ask you some questions. The first question is about why
4 you left, stopped working for Thesis. It was to go to work,
5 as I understood, to go to work for Federal Painting?

6 MR. MELICK: Objection as to relevance.

7 HEARING OFFICER BRYSON: Overruled. I'll allow it.

8 Please answer.

9 THE INTERPRETER: I'm sorry, what was the name of the?

10 MR. BASKIN: Federal Painting.

11 Q. BY MR. BASKIN: Was it to go to work for Federal
12 Painting?

13 A. Yes.

14 Q. So you quit Thesis?

15 A. Yes.

16 Q. After you started working at Federal Painting, was your
17 paycheck higher, more?

18 A. Yes.

19 Q. And you went around and told the Thesis employees that,
20 right?

21 A. No, I did not tell everybody.

22 Q. Okay. Which ones -- you told some people? I don't
23 actually need to know the names.

24 A. No.

25 Q. Not everybody, not some? You never told a single person

1 that your paycheck was higher?

2 A. Just one person, because I consider him a friend.

3 Q. Did you talk to the Union about telling people that the
4 Union was good?

5 A. They were asking me questions. A lot of people were
6 saying that they wanted to join the Union, and I answered
7 them the truth.

8 Q. Where was this, at the job site?

9 A. No, over the phone.

10 Q. Did you talk to the Union about what you should tell
11 those people?

12 A. No.

13 Q. Did you have any conversations with the Union during the
14 election campaign?

15 A. When we were going to go vote?

16 Q. Yes.

17 A. Not at that moment.

18 Q. No, before, any time before.

19 A. Before, yes.

20 Q. About how you could help?

21 MR. MELICK: Objection. I mean this has nothing to do
22 with the election challenges.

23 MR. BASKIN: Actually, it does. It has to do with
24 whether his agency status, his representative status -- it's
25 one of the elements.

1 HEARING OFFICER BRYSON: Overruled. I'll allow it. Go
2 ahead; please repeat your question.

3 Q. BY MR. BASKIN: So we established you had some
4 discussions with the Union talking about how you could help
5 them.

6 A. Only with one person.

7 Q. From the Union?

8 A. Yes.

9 Q. Who was that?

10 A. His name is Jose Viera, because he had called me.

11 Q. I see. And what did he want you to do?

12 A. To help him get in our company.

13 Q. Did you agree to do that?

14 A. No, not at that time.

15 Q. Later?

16 A. No.

17 Q. All right. So the union man asked you to help. And
18 your testimony today is you told him no?

19 A. To help who?

20 Q. To help the Union.

21 A. To help the Union, no. I'm talking about the job.

22 Q. What do you mean by that?

23 A. Viera told me if I could help him, if I could help him
24 join the company. The company was Federal, okay.

25 Q. So Viera told you to go to, to join Federal?

1 A. Federal company, where I work.

2 Q. Now, you say that you just -- on the day of the vote,
3 isn't it true that you were wearing a union shirt?

4 A. No.

5 Q. Do you have a union shirt?

6 A. No.

7 Q. So even working for Federal, a union company, you don't
8 have a union shirt?

9 A. No.

10 Q. All the people who said that you were supporting the
11 Union to them are wrong?

12 MR. MELICK: Objection as to the question. If you want
13 to ask him specific people who he told?

14 HEARING OFFICER BRYSON: What was the question again,
15 before I make a ruling?

16 MR. BASKIN: Are you saying that all the people who say
17 you were supporting the Union are lying?

18 HEARING OFFICER BRYSON: Overruled. I'll allow it. Go
19 ahead; answer the question.

20 THE WITNESS: I'm confused.

21 Q. BY MR. BASKIN: Okay. Some people have said you were
22 helping the Union after you left the Thesis company. And
23 you were, right?

24 A. Okay, now I get it. Yes, during that time, yes.

25 Q. So you were helping the Union?

1 A. Yes.

2 Q. How did you go about helping the Union during that time?

3 A. The company where I work, it was a company that was
4 paying me more.

5 Q. And so you told?

6 A. So I told Viera only.

7 Q. With the intent that he would let other people know?

8 A. No, that was his problem, if he wanted to tell them.

9 Q. Did you tell him to keep it a secret?

10 A. No.

11 Q. Okay. So despite what you said before, you were helping
12 the Union win the election at Thesis?

13 A. No. It was before.

14 Q. Right, before the election. The election was July 31.

15 The petition was filed on July 9th. So during July, any
16 time in July, you were helping the Union, were you not?

17 A. Before, yes, only one time.

18 Q. On the day of the election, isn't it true you stayed
19 until at least 4 o'clock?

20 A. I can't tell you, because it's not true.

21 Q. Also, you're saying it's not true that you were seen
22 wearing -- that you were wearing a black shirt for the
23 Union?

24 A. Yes, that's a lie.

25 Q. Now, you did say that you spent some time talking to

1 some people before you voted, after you voted, right?

2 A. No.

3 Q. So your testimony now is you did not talk to anyone
4 while you were waiting to vote?

5 A. When I came inside to vote, after I voted, I just shook
6 their hands and I left.

7 Q. And before you voted, you didn't talk to anyone?

8 A. When I was in my car, some people arrived. I shook
9 their hands, and then I went inside to vote.

10 MR. BASKIN: No further questions.

11 HEARING OFFICER BRYSON: Do you have any further
12 questions for the Petitioner?

13 MR. MELICK: Just one question or a few maybe.

14 REDIRECT EXAMINATION

15 Q. BY MR. MELICK: You testified about Jose Viera; is that
16 correct?

17 A. It's my friend.

18 Q. The time you were talking to him, he was an employee of
19 Thesis; is that correct?

20 A. Yes.

21 MR. MELICK: That's it. No more questions.

22 MR. BASKIN: Nothing further.

23 HEARING OFFICER BRYSON: Okay. The witness is excused.
24 You can go.

25 (Witness excused.)

1 MR. MELICK: Call Noe Raymundo.

2 HEARING OFFICER BRYSON: Mr. Raymundo, will he need --

3 MR. MELICK: Yeah, he needs an interpreter.

4 HEARING OFFICER BRYSON: Okay. Could I have you raise
5 your right hand, please.

6 (Whereupon,

7 JOSE NOE RAYMUNDO

8 was called as a witness by and on behalf of the Petitioner
9 and, after having been duly sworn through the Interpreter,
10 was examined and testified as follows:)

11 HEARING OFFICER BRYSON: Please have a seat. I'll need
12 you to state your name and spell it for the record, please.

13 THE WITNESS: Jose Noe Raymundo. Jose, J-o-s-e N-o-e
14 R-a-y-m-u-n-d-o.

15 DIRECT EXAMINATION

16 Q. BY MR. MELICK: Hi, Mr. Raymundo. Where are you
17 employed currently?

18 A. Federal Painting.

19 Q. You previously worked for Thesis Painting?

20 A. Yes.

21 Q. When did you work for Thesis?

22 A. From 2013 to 2015.

23 Q. Do you know the month in 2015 when your employment
24 ended? It's okay, if you don't know.

25 A. In May.

1 Q. Have you ever been an employee of District Council 51 of
2 the Painters Union?

3 A. No.

4 Q. At the July 31st election at Thesis Painting, did you
5 serve as an election observer?

6 A. Yes.

7 Q. Were you the only election observer for the Union?

8 A. Yes.

9 Q. And do you recall the time for voting was between
10 3 o'clock and 5 o'clock?

11 A. Yes.

12 Q. During that time period, did you tell any employee how
13 to vote?

14 A. No.

15 Q. When did you arrive on July 31st at Thesis?

16 A. Around August 1st? You mean the time, right?

17 Q. The election was on July 31st, between 3:00 and 5:00.
18 What time on July 31st did you arrive at Thesis Painting?

19 A. 2:00.

20 Q. 2 o'clock?

21 A. 2 o'clock.

22 Q. Between 2 o'clock and 3 o'clock, did you talk to any
23 employees of Thesis?

24 A. No.

25 Q. Between 3:00 and 5:00, did you wear any clothing, any

1 T-shirt specifically with union symbols?

2 A. Yes.

3 Q. When did you -- did you remove the T-shirt with the
4 union symbol?

5 A. Yes.

6 Q. What time did you remove the T-shirt with the union
7 insignia?

8 A. 3 o'clock.

9 Q. 3 o'clock, okay. Did somebody instruct you to take this
10 shirt off?

11 A. Yes.

12 Q. Was this person with the National Labor Relations Board?

13 A. Yes.

14 Q. Did you see any employee of Thesis Painting wearing any
15 shirt with union insignia?

16 A. No.

17 Q. Did you see any non-employee of Thesis Painting wearing
18 any shirt with union insignia?

19 A. No.

20 Q. So, between 3:00 and 5:00, that 2-hour period, were you
21 in this conference room here on the right?

22 MR. BASKIN: You're showing Exhibit 1.

23 HEARING OFFICER BRYSON: Yeah, which exhibit is this?

24 MR. MELICK: It's exhibit -- is it 1(b)?

25 THE INTERPRETER: 1(a).

1 MR. MELICK: 1(a).

2 HEARING OFFICER BRYSON: 1(a), okay.

3 Q. BY MR. MELICK: That whole two-hour period, you were in
4 that room?

5 A. Yes.

6 MR. MELICK: No more questions.

7 MR. BASKIN: Just a couple.

8 CROSS-EXAMINATION

9 Q. BY MR. BASKIN: You just said you were inside the room
10 the whole period of the vote, right?

11 A. Yes.

12 Q. So while you were inside, you wouldn't see what anyone
13 was wearing outside, right?

14 A. No.

15 Q. And you quit to go to Federal Painting, did you say,
16 quit Thesis?

17 A. Yes.

18 MR. BASKIN: No questions -- I'm sorry, one other.

19 Q. BY MR. BASKIN: Did it get noisy, so noisy that the
20 Labor Board agent had to go outside and tell everybody to be
21 more quiet?

22 A. Yes.

23 Q. So there were a lot of people inside that small office
24 area at different times during the voting, outside the
25 conference room in that other --

1 A. I can't tell. I couldn't tell, because I wasn't --

2 Q. You were inside, okay.

3 MR. BASKIN: All right, no further questions.

4 HEARING OFFICER BRYSON: Before you go, just going back
5 to when you took the shirt off, when was that? Was that
6 after the poll started, so it was after the Board Agent
7 said, okay, polls are open? What happened after that? You
8 took off your shirt; you threw it somewhere, or you took it
9 to your car? What happened?

10 THE WITNESS: I went to the car and took the shirt off.

11 HEARING OFFICER BRYSON: This was after you had already
12 started -- let's say the agent who was there says, okay,
13 polls are open. Was it after that when she asked you if you
14 would take your shirt off?

15 THE WITNESS: It was before.

16 MR. BASKIN: One other question, if I may?

17 HEARING OFFICER BRYSON: Go ahead.

18 Q. BY MR. BASKIN: Do you recall how many people were
19 gathered at the front door when you went inside, after
20 taking your shirt off?

21 A. I don't have the total number.

22 Q. Roughly? More than two?

23 A. Yes.

24 Q. More than five?

25 A. Yes.

1 Q. More than 10?

2 A. I believe about 10.

3 Q. All right. Do you know someone named Enrique who was
4 there that day?

5 A. No.

6 MR. BASKIN: No further questions.

7 MR. MELICK: No further questions.

8 HEARING OFFICER BRYSON: All right, you're released.
9 You can go.

10 (Witness excused.)

11 HEARING OFFICER BRYSON: Anything?

12 MR. MELICK: Yeah, we have one more witness. He just
13 needs to take a bathroom break.

14 HEARING OFFICER BRYSON: I can do that now.

15 MR. MELICK: You're sure?

16 HEARING OFFICER BRYSON: It's all right.

17 MR. MELICK: It takes 2 minutes.

18 HEARING OFFICER BRYSON: Let's go off the record.

19 (Off the record from 12:54 p.m. to 12:55 p.m.)

20 HEARING OFFICER BRYSON: Raise your right hand, please.
21 (Whereupon,

22 SANDRO BAIZA

23 was called as a witness by and on behalf of the Petitioner
24 and, after having been duly sworn, was examined and
25 testified as follows:)

1 HEARING OFFICER BRYSON: Please have a seat. Please
2 state your name aloud and spell it for the record, please.

3 THE WITNESS: My name is Sandro Baiza. It's spelled
4 S-a-n-d-r-o, Baiza is B, as in boy, a-i-z-a.

5 DIRECT EXAMINATION

6 Q. BY MR. MELICK: Mr. Baiza, where are you currently
7 employed?

8 A. I am employed by DC 51 Painters.

9 Q. What's your job?

10 A. I am a market representative.

11 Q. Do you help to organize workplaces?

12 A. Yes, sir.

13 Q. Were you the lead organizer in the Thesis union
14 campaign?

15 A. Yes, sir.

16 Q. Did you go to Thesis Painting on July 31st?

17 A. Yes, sir.

18 Q. When did you arrive there?

19 A. Approximately about 2:25.

20 Q. Was there anyone else from the Union present at that
21 time?

22 A. Yes, sir.

23 Q. Who?

24 A. I had four guys with me. Two just left. One was
25 Charlie Parker, Derwin Scalp, Sergio Perez, and another guy

1 from the insulator union, his name is Edwin Recinos.

2 Q. Why were the five of you there?

3 A. Two guys, it was in the purpose to train them because
4 they've never been in election.

5 Q. And you were attending the pre-election meeting?

6 A. Yes, sir.

7 Q. What time was that held?

8 A. I was waiting outside, to waiting for the person who was
9 in charge of the election. I wait there for 5 minutes.
10 When I don't see she show up, I went inside the office to
11 see if she was there, and she was already there.

12 Q. Who actually went inside with you to the pre-election
13 meeting?

14 A. Sergio Perez and Edwin Recinos.

15 Q. So it was just the three of you from the Union?

16 A. Yes, sir.

17 Q. Prior to the voting period, did anyone else from the
18 Union enter the company's office?

19 A. No.

20 Q. On the day of the election, did you speak with any
21 employee of Thesis?

22 A. No, sir.

23 Q. Did you speak to any person who was voting in the
24 election, whether they were an employee or not?

25 A. No, sir.

1 Q. What time did you leave the company's office?

2 A. Approximately between 5, 4 minutes before the election
3 start.

4 Q. So around 2:55?

5 A. 2:55, let's put it there.

6 Q. And did the four union guys with you, did they leave at
7 the same time?

8 A. When I leave the door, they was in the parking lot. I
9 told them follow me because we've got to leave from this
10 place.

11 Q. So all five of you left the premises --

12 A. Yes.

13 Q. -- prior to 3 o'clock?

14 A. Right. Three was together. Sergio and Edwin was in my
15 car. And the other guys drive their own car. They follow
16 me.

17 Q. So during the election, did any employee of the Union
18 remain on the company's premises?

19 A. No, sir.

20 Q. Do you know who Adan Guzman is?

21 A. Yes, sir.

22 Q. Did he help in any way organize the employees at Thesis
23 prior to the election?

24 A. I call him one day to come in and help me, let's go, you
25 know, because he know more of the workers for Thesis, and I

1 said maybe they're going to feel comfortable to open the
2 door when they see me, when I arrive to their house. He was
3 very busy. He said maybe I can help you for a couple of
4 hours, because I'm a busy man. I said, okay, I appreciate
5 that.

6 Q. Was that the only time he assisted?

7 A. Only one time, yes.

8 Q. Did you ever instruct him the day of the election or
9 prior to the election to speak to employees on the day of
10 the election about how to vote?

11 A. No, sir.

12 Q. Prior to or on the day of the election, did you instruct
13 anyone to tell employees how to vote in the election?

14 A. No. I know how to do my job.

15 MR. MELICK: No more questions.

16 HEARING OFFICER BRYSON: Mr. Baskin?

17 CROSS-EXAMINATION

18 Q. BY MR. BASKIN: So your testimony is you called Adan
19 Guzman and asked him to help organize, help you organize at
20 Thesis; is that correct?

21 A. I was organizing and I call him to come in. When I
22 receive the Excelsior list, I'm allowed to visit the
23 workers. I told him I'd like to see if he can come one day
24 with me till the workers feel comfortable, they know someone
25 who used to be working at Thesis. That's the reason I call

1 him to come help me.

2 Q. So he did that with you?

3 A. Yes, one day.

4 Q. So employees would understand that he was helping you,
5 was helping represent the Union. He was right there with
6 you.

7 A. He was with me, yes.

8 Q. And so when he failed to acknowledge that in his
9 testimony just a few minutes ago, he was lying?

10 A. He not lie, because he don't know how I mean it's
11 organized. I told him to come in with me to the workers
12 from Thesis to feel comfortable. When they see me, they can
13 open the door because they see an ex-member from Thesis. It
14 is not --

15 Q. All right. But I asked --

16 A. -- because he's helping to organize.

17 Q. I'm sorry. I asked him if he had spoken to anyone at
18 the Union and he said -- you were sitting right in front of
19 him. He did not say that he had -- he did not acknowledge
20 speaking to you, right? I mean you were here.

21 A. I can't answer his question. He already did this
22 question.

23 Q. And it was different from what you just testified.

24 Okay.

25 MR. BASKIN: No further questions.

1 REDIRECT EXAMINATION

2 Q. BY MR. MELICK: When did you go with Adan to employees'
3 houses?

4 A. I will say approximately about 5 minutes before the
5 election -- I mean 5 days, 5 days before the election, 5
6 days.

7 Q. Five days before the election.

8 A. When I receive the Excelsior list.

9 Q. And that was the only time that Adan went with you to an
10 employee's house?

11 A. That's the only time he went with me.

12 MR. MELICK: No further questions.

13 RECROSS-EXAMINATION

14 Q. BY MR. BASKIN: And how many houses -- I'm sorry, I can
15 go again?

16 HEARING OFFICER BRYSON: Surely.

17 Q. BY MR. BASKIN: And you were referring to the Excelsior
18 list, the voter eligibility list?

19 A. Right.

20 Q. That's when you did it, you got that list?

21 A. Right.

22 Q. So 5 days before the election, you and he, together,
23 visited homes of the employees. How many homes, do you
24 recall?

25 A. We went to one house, because he told me he know a good

1 friend of him working with Thesis Painting. His name is
2 Jose Viera. We went to his house together. That's the only
3 one, the place he went with me, because he was living close
4 to there, too.

5 Q. So that confirms the other testimony that we heard from
6 other people today. Thank you very much.

7 MR. BASKIN: No further questions.

8 HEARING OFFICER BRYSON: Anything else?

9 MR. MELICK: No.

10 HEARING OFFICER BRYSON: All right, Mr. Baiza, you're
11 free to go.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 HEARING OFFICER BRYSON: Does the Petitioner have any
15 more witnesses?

16 MR. MELICK: No.

17 HEARING OFFICER BRYSON: Mr. Baskin, what is the
18 Employer's -- before I start, are you ready --

19 MR. BASKIN: No further witnesses.

20 HEARING OFFICER BRYSON: Nothing further, okay. What is
21 the Employer's final position regarding the objections to
22 the election?

23 MR. BASKIN: Sure. And this is in lieu of -- time to
24 make our final statement in lieu of briefs; is that where
25 we're at?

1 HEARING OFFICER BRYSON: You may do so, yes.

2 MR. BASKIN: Okay. Sometimes, it's a two-step process
3 in these things.

4 ORAL ARGUMENT

5 MR. BASKIN: Okay. Well, here's our position. We have
6 established -- the testimony, the credible testimony has
7 established that union agents or representatives engaged in
8 improper electioneering or surveillance, either one of which
9 is sufficient to overturn this election because they were in
10 such close proximity of the polling area.

11 Under the Milchem rule, the rule of thumb is 50 feet.
12 This is well within that. There has been no dispute with
13 the pictures and the testimony that it's 10 feet from that
14 front door to the actual voting area. And as you can see,
15 the front door is made of glass.

16 Under that rule, union representatives -- and you don't
17 have to be an employee of the Union. You don't have to be
18 even an agent of the Union. A representative is sufficient,
19 although we believe that Mr. Guzman was made an agent for
20 reasons that I'll get to in just a second.

21 But for them to communicate with employees and
22 regardless of what they say to the employees under the
23 Milchem rule, and even if they don't communicate at all,
24 under the Nathan Katz Realty rule about surveillance, if the
25 employees, the voters have to go by them to get in the door

1 to vote with proximity to the voting area, the election is
2 set aside. And this is not an overwhelming vote; a
3 difference of five votes, not to mention there were some
4 challenged ballots that weren't counted. It would have
5 changed the result of this election.

6 We've had testimony that there was a crowd of people
7 there from the beginning, that they wore black shirts,
8 notwithstanding the regrettably non-credible testimony of
9 Mr. Guzman; that there were union -- people identified as
10 union, non-employees, as well as voters. Mr. Guzman himself
11 acknowledged that he had quit the Employer, so he is a non-
12 employee. He is not an eligible voter.

13 And so we have a group that frankly should have been
14 moved farther away by the Board Agent. For some reason,
15 there was no clear "no electioneering" area set up there.
16 But even once the vote started, Mr. Guzman and another
17 individual who was also a non-employee were there for at
18 least an hour, under the credible testimony.

19 And you are -- the Region is going to need to make a
20 credibility determination because Mr. Carranza, who was
21 quite specific and gave detailed testimony and was we
22 believe completely truthful, and it's significant that his
23 affidavit was not introduced against him because it was
24 completely consistent, whereas Mr. Guzman was noted to be
25 inconsistent with testimony of other people.

1 Most notably, the testimony of the market
2 representative, who said that contrary to what Guzman
3 described, he had designated him as an agent or a
4 representative, whichever way you look at it, to accompany
5 him to speak to Thesis workers, which was in turn reported
6 around and which Nelson, the Employer's witness, had heard
7 truthfully from Jose. The Union knew this would get around.
8 And there he was at the election within 10 feet of the
9 polling area, electioneering or posting himself.

10 We have testimony that he did, in fact, speak to the
11 workers. He denies it. We have testimony that he was there
12 for at least an hour. He non-credibly denies it. But if
13 that testimony, the testimony of Nelson and Juan is
14 credited, then we have established clearly the elements
15 necessary to set aside this election, in part through the
16 testimony of the Union's own witnesses themselves, because
17 we have the union agents or representatives engaged in
18 either improper electioneering or surveillance, in close
19 proximity to the polling area where they should not have
20 been. Under those circumstances, people were coming in,
21 having to run a gauntlet, or walk it, in order to get in to
22 vote.

23 There was testimony about black shirts, even the Union
24 observer running out to take off his black shirt. It's
25 simply not credible that all these other union supporters,

1 Mr. Guzman denying that he was wearing them, when multiple
2 people saw them.

3 Even if there is not a union agent or representative on
4 the scene, merely the presence of union supporters among the
5 employees in such proximity of the polling area is also
6 established, again for similar reasons which I am not going
7 to repeat, albeit under a slighter standard.

8 I do want to give you some case sites. Of course, the
9 Milchem case. I assume the Board has a copy of that
10 somewhere. But also the Boston Insulated Wire & Cable
11 Company case, 259 NLRB 1118, from 1982; the Nathan Katz
12 Realty case versus NLRB, it's a D.C. Circuit case, 251 F.3d
13 918, particularly at Page 991, D.C. Circuit, where the court
14 said relying in part on the Board's own ruling previously in
15 Electric Hose & Rubber, 262 NLRB 186, from 1982, that a
16 person is improperly stationed, a person of interest, a
17 representative or agent of the Union, if they are stationed
18 at a spot where the voters have to go by them in order to
19 get into the voting area, whether it's an employer
20 supervisor or a union representative, that by itself is a
21 violation and requires setting aside the election.

22 That's what happened in Electric Hose, and that is
23 ultimately what happened in Nathan Katz Realty. But we also
24 do have testimony he didn't just station himself there. He
25 was talking to people. And that is explicitly prohibited by

1 the Milchem rule, and you don't have to get into questions
2 of surveillance.

3 I'd cite for you also the Star Expansion Industrial
4 Corp. case, 170 NLRB at 364; the Performance Measurement
5 Company case, 148 NLRB 1647, a 1964 case; Claussen Baking
6 Company, 134 NLRB 111; and Detroit Creamery, 60 NLRB 178.

7 So for all those reasons, the testimony that we have
8 presented establishes what needs to be established in order
9 to set aside an election under these circumstances. Thank
10 you very much.

11 HEARING OFFICER BRYSON: All right, thank you.

12 Petitioner?

13 ORAL ARGUMENT

14 MR. MELICK: There is no credible evidence of union
15 involvement in whatever alleged electioneering took place
16 here. The Employer alleges that one employee allegedly
17 spoke with employees who were voting, but there is no
18 credible testimony to establish that he spoke about how to
19 vote. He was at the election site for 10 minutes at the
20 most. He testified that he went in to vote and left and
21 shook hands with a few employees. That's all he did.

22 The affidavits of both the Employer witnesses contradict
23 repeatedly their testimony. Just please review the
24 affidavits, and you'll see that.

25 MR. BASKIN: I object to --

1 MR. MELICK: The Employer --

2 MR. BASKIN: I have to make an objection to referring to
3 items that are not in evidence.

4 MR. MELICK: Well, the affidavits are part of the
5 record.

6 MR. BASKIN: No, the affidavits are not, plural.

7 HEARING OFFICER BRYSON: Yeah, these won't be part of
8 the record.

9 MR. MELICK: Regardless --

10 MR. BASKIN: More importantly, the one is not
11 inconsistent, so it was not made an exhibit. Anyway, I'm
12 sorry, I just wanted to register that.

13 MR. MELICK: The Employer cannot credibly establish the
14 other alleged union agent even exists. There is simply no
15 credible evidence the employees had to go by any union agent
16 on the way to vote. I think, in conclusion, the objections
17 are completely without merit.

18 HEARING OFFICER BRYSON: Okay. The parties are reminded
19 that they should request an expedited copy of the transcript
20 from the court reporter. Late receipt of the transcript
21 will not be grounds for -- well, we're not going to do
22 briefs.

23 Is there anything further?

24 MR. BASKIN: No.

25 HEARING OFFICER BRYSON: Petitioner?

1 MR. MELICK: No.

2 HEARING OFFICER BRYSON: Nothing, all right.

3 If there is nothing further, the hearing will be closed.

4 I hear no response. The hearing is now closed.

5 Off the record.

6 (Whereupon, at 1:14 p.m., the hearing in the above-entitled
7 matter was closed.)

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1 CERTIFICATION

2 This is to certify that the attached proceedings before
3 the National Labor Relations Board (NLRB), Region 5, in the
4 matter of THESIS PAINTING, INC., Case No. 05-RC-155713, at
5 Washington, D.C., on August 21, 2015, was held according to
6 the record, and that this is the original, complete, and
7 true and accurate transcript that has been compared to the
8 recording, at the hearing, that the exhibits are complete
9 and no exhibits received in evidence or in the rejected
10 exhibit files are missing.

11

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13

14

_____*Catherine A. Belka*_____

15

Cathy Belka

16

Court Reporter

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**BOARD EXHIBITS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

Case No.: 05-RC-155713

THEESIS PAINTING, INC.

Employer

And

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51**

Petitioner

Place: Washington, DC

Date: 08/21/15

OFFICIAL REPORTERS

**Veritext National Court Reporters
Mid-Atlantic Region
1250 Eye Street, NW – Suite 1201
Washington, DC 20005
888-777-6690**

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

Board Exhibit No. 1(a) Original Petition filed 7/9/15

- | | | |
|---|---|---|
| " | " | 1(b) Original Notice of Hearing with Form NLRB-4669 Attached, dated 7/10/15 |
| " | " | 1(c) Original Affidavit of Service of Board Exhibit No. 1(b), dated 7/10/15 |
| " | " | 1(d) Tally of Ballots, dated issued 7/31/15 |
| " | " | 1(e) Employer's Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election dated 8/7/15 |
| " | " | 1(f) Report on Objections and Notice of Hearing dated 8/12/15 |
| " | " | 1(g) Original Affidavit of Service of Board Exhibit No. 1(f), dated 8/12/15 |
| " | " | 1(h) Index and Description of Formal Documents |

THESES PAINTING, INC.
5-RC-155713

BOARD EXHIBIT NO. 1 (H)

B-1a-1h
CB
8/21/15

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THESIS PAINTING, INC.
Employer

and
INTERNATIONAL UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO, DISTRICT COUNCIL 51
Petitioner

Cases 05-RC-155713

DATE OF SERVICE August 12, 2015

AFFIDAVIT OF SERVICE OF

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

REGULAR MAIL

Mark G. Eskenazi, Esq.
Littler Mendelson, P.C.
1150 17th Street, N.W., Suite 900
Washington, DC 20036-4655

REGULAR MAIL

Maurice Baskin, Esq.
Littler Mendelson, P.C.
1150 17th Street, N.W., Suite 900
Washington, DC 20036-4655

REGULAR MAIL

Ms. Barbara Spyridakis, Owner
Thesis Painting, Inc.
7401-D Fullerton Road
Springfield, VA 22153

REGULAR MAIL

Mr. Sandro Baiza, Marketing Representative
International Union of Painters and Allied Trades,
AFL-CIO, District Council 51
4700 Boston Way
Lanham, MD 20706-4311

| | |
|---|--|
| Subscribed and sworn before me this 12 of August 2015. | DESIGNATED AGENT /s/ Vivian Brown NATIONAL LABOR RELATIONS BOARD |
|---|--|

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

THESIS PAINTING, INC.

and

Case 5-RC-155713

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51

REPORT ON OBJECTIONS
AND
NOTICE OF HEARING

Pursuant to a Stipulated Election Agreement¹ approved on July 17, 2015,² a secret-ballot election was conducted under my supervision on July 31 with the following results:

| | |
|---|----|
| Approximate number of eligible voters | 32 |
| Void ballots | 0 |
| Votes cast for Petitioner | 21 |
| Votes cast against participating labor organization | 11 |
| Valid votes counted | 32 |
| Challenged ballots | 5 |
| Number of valid votes counted plus challenged ballots | 37 |

Challenges were not sufficient to affect the results of the election.

The Employer filed timely objections to conduct affecting the results of the election on August 7, a copy of which is attached as Exhibit A.³

¹ The unit is: "All full-time and regular part-time painters and lead painters employed by the employer, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act."

² All dates are in the year 2015 unless noted otherwise.

³ The petition was filed on July 9. The undersigned will consider on its merits only objections that alleged interference that occurred during the critical period that begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453.

Objection No. 1: During the election, the Union, through its agents and/or representatives, engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

Objection No. 2: During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

In support of its Objections, the Employer submitted the witness affidavits of Employees A and B. Both Employees A and B state that during the polling, two unnamed representatives of the Petitioner stood outside the building door and spoke to voters as they entered the building. Employee A identifies the distance between the entrance and the conference room where the polling took place as approximately 10 to 15 feet, and Employee B estimates the distance at 10 to 12 feet. Employees A and B also state that some employees of the Employer wearing shirts with the Petitioner's insignia on them stood in the lobby between the building door and the polling area during the time the polls were open. According to Employee B, they spoke with voters who passed by them on their way to the polling place and told them how to vote. Finally, Employee A states that during some period when the polls were open, the employees who had been standing in the lobby exited the building and joined Union representatives who were standing outside the building door speaking to voters.

The Board's rule announced in *Milchem, Inc.*, 170 NLRB 362 (1968) applies to conduct by a party of the election, where an agent or representative of that party engages in prolonged conversations with voters in close proximity to the polls during a substantial part of the voting period. Regardless of the content of the conversations, such conduct may result in the election results being set aside.

The *Milchem* rule does not apply to third-party conduct. A third party can be an employee of the employer who has no actual or apparent authority to act for either party. *Corner Furniture Discount Center*, 339 NLRB 1122 (2003). The Board accords less weight to such conduct than to conduct directly attributable to the parties. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958). The Board considers the evidence of fear and coercion in determining whether third

party interference is sufficient to warrant setting aside the election and whether the conduct complained of was so related to the election as to have a probable effect on the employees' actions at the polls or precluded employees from exercising free choice. *Monroe Auto Equipment Co.*, 186 NLRB 90 (1970). The Board considers the cumulative incidents and objections, rather than the isolated individual incidents of conduct and attributes less weight to the pro-union employees' conduct outside the polling area.

I find that Objections 1 and 2, along with the supporting evidence, raise substantial and material issues which can best be resolved by record evidence. Therefore, a hearing is warranted with respect to whether the conduct alleged in Objections 1 and 2, interfered with the results of the election.

NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at 9:00 a.m., E.D.T., on August 21, 2015 at the National Labor Relations Board office located at 1015 Half Street, S.W., Washington, DC 20003, and on consecutive days thereafter until concluded, a hearing will be conducted before a designated Hearing Officer of the National Labor Relations Board on the issues raised by Petitioner's Objections 1 and 2, at which time and place the parties will have the right to appear in person, or otherwise, and give testimony.

Dated at Baltimore, Maryland this 12th day of August 2015.

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 05
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

In the Matter of:

THESIS PAINTING, INC.,

Employer

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Petitioner.

Case No. 05-RC-155713

**EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND
TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to the Rules and Regulations of the National Labor Relations Board including section 102.69(a) thereof, Thesis Painting, Inc., the Employer in the above-captioned matter hereby files the following Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election in connection with the election conducted by Region 5 on July 31, 2015. Also filed today with these Objections is the Employer's Statement of Position and Evidence in Support of Objections to the Election.

The Employer alleges that the following conduct improperly affected the election and requires that the election be set aside and that a new election be held:

1. During the election, the Union, through its agents and/or representatives, or engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.
2. During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in

improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

Based upon each of the foregoing Objections, or in combination thereof, the Employer respectfully submits that the election must be set aside and a new election held.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin

Mark Eskenazi

Little Mendelson, P.C.

1150 17th St., N.W.

Washington, D.C. 20036

P: 202-772-2526

F: 202-842-0011

mbaskin@littler.com

meskenazi@littler.com

Attorneys for the Employer

August 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election have been served on the following, this 7th day of August, 2015:

Sandro Baiza, Marketing Representative
International Union of Painters and Allied Trades, AFL-CIO,
District Council 51
4700 Boston Way
Lanham, MD 20706

/s/ Maurice Baskin

FORM NLRB-760
(7-10)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed

Jul 9, 2015

THESIS PAINTING INC.,
Employer
and
INTERNATIONAL UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO, DISTRICT COUNCIL 51
Petitioner

Case No. 5-RC-155713

Date Issued 07/31/2015

City Springfield

State VA

Type of Election:
(Check one;)(If applicable check
either or both;)☒ Stipulation☐ 8(b)(7)☐ Board Direction☐ Mail Ballot☐ Consent Agreement☐ RD Direction
Incumbent Union (Code)

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 32
2. Number of Void ballots 0
3. Number of Votes cast for PETITIONER 21
4. Number of Votes cast for _____
5. Number of Votes cast for _____
6. Number of Votes cast against participating labor organization(s) 11
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 32
8. Number of challenged ballots 5
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 37
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51

For the Regional Director - Region 5

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

Terry R. Skog

For PETITIONER

[Signature]

For

BOARD EXHIBIT NO. 1(D)

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

| | |
|--|--------------------------|
| Thesis Painting, Inc. Employer and International Union of Painters and Allied Trades, AFL-CIO, District Council 51 Petitioner | Case 05-RC-155713 |
|--|--------------------------|

AFFIDAVIT OF SERVICE OF: Petition dated July 9, 2015, Notice of Representation Hearing dated July 10, 2015, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 10, 2015, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Ms. Barbara Spyridakis, Owner
Thesis Painting, Inc.
7401-D Fullerton Road
Springfield, VA 22153
barbara@thesispainting.com
Fax: (703)440-5929

Mr. Sandro Baiza, Marketing Representative
International Union of Painters and Allied
Trades, AFL-CIO, District Council 51
4700 Boston Way
Lanham, MD 20706-4311
Fax: (301)918-3177

| | |
|------------------------------|---|
| <u>July 10, 2015</u> Date | <u>Vivian Brown, Designated Agent of NLRB</u> Name |
| | <u>/s/ Vivian Brown</u> Signature |

BOARD EXHIBIT NO. 1 (C)



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**



| | |
|--|---|
| Thesis Painting, Inc. <p style="text-align: center;">Employer</p> <p style="text-align: center;">and</p> International Union of Painters and Allied Trades, AFL-CIO, District Council 51 <p style="text-align: center;">Petitioner</p> | <p style="text-align: center;">Case 05-RC-155713</p> |
|--|---|

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 9:00 a.m. on **Monday, July 20, 2015** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at, **National Labor Relations Board, Board Hearing Room 6th Floor, 1015 Half Street, S.W., Washington, DC 20003**, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Thesis Painting, Inc. must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on July 17, 2015. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: July 10, 2015

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 05
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201

FORM NLRB-502 (RC)
(4-15)UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

5-RC-155713

Date Filed

7/9/15

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer

Thesis Painting, Inc.

2b. Address(es) of Establishment(s) Involved (Street and number, city, State, ZIP code)

7401-D Fullerton Road, Springfield, VA 22153

3a. Employer Representative - Name and Title

Barbara Spyridakis, Owner

3b. Address (If same as 2b - state same)

SAME AS ABOVE

3c. Tel. No.

703-440-5900

3d. Cell No.

3e. Fax No.

703-440-5929

3f. E-Mail Address

Barbara@ThesisPainting.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Painting contractor

4b. Principal product or service

Painting services

5a. City and State where unit is located:

Springfield, VA

5b. Description of Unit Involved

Included: All full-time and regular part-time painters employed by the Employer.

Excluded: All estimators, office-clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

6a. No. of Employees in Unit:

40

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One: ☒ 7a. Request for recognition as Bargaining Representative was made on (Date) 07-09-2015 and Employer declined recognition on or about No reply (Date) (If no reply received, so state).

☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel. No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

None

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: Manual ☒ Mail ☐ Mixed Manual/Mail ☐

11b. Election Date(s):

July 29, 2015

11c. Election Time(s):

11d. Election Location(s):

12a. Full Name of Petitioner (including local name and number)

International Union of Painters and Allied Trades, AFL-CIO, District Council 51

12b. Address (street and number, city, state, and ZIP code)

4700 Boston Way, Lanham, MD 20706

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (If none, so state)

International Union of Painters and Allied Trades, AFL-CIO

12d. Tel. No.

301-918-0182 ext. 117

12e. Cell No.

240-508-9834

12f. Fax No.

301-918-3177

12g. E-Mail Address

SBaiza@Verizon.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title

Sandro Baiza, Marketing Representative

13b. Address (street and number, city, state, and ZIP code)

SAME AS ABOVE

13c. Tel. No.

SAME AS ABOVE

13d. Cell No.

SAME AS ABOVE

13e. Fax No.

SAME AS ABOVE

13f. E-Mail Address

SAME AS ABOVE

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Sandro Baiza

Signature

Title

Marketing Representative

Date

07-09-2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

I-1412892492

BOARD EXHIBIT NO. 1 (A)

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

| |
|---|
| Correct Name of Employer: |
| Thesis Painting, Inc. |
| Case No. 05-RC-155713 |
| Correct Name of Petitioner: |
| INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51 |
| Correct Name of Intervenor: |

STIPULATION

We stipulate and agree that:

1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.
2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the formal documents are amended to correctly reflect the names as set forth above.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.
4. The Petitioner is qualified to represent the unit within the meaning of Section 9(b)(3) of the Act.
5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there are no contract bars to these proceedings.
6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts:

The Employer, Thesis Painting, Inc., a Virginia corporation with an office and

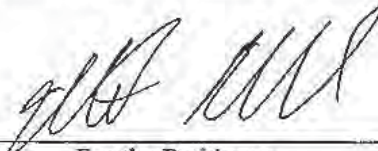
*Board 2
CB
8/21/15*

place of business in Springfield, Virginia, is engaged in the business of providing commercial painting services throughout the Washington D.C. metropolitan area, including Virginia and Maryland. In conducting its operations during the 12-month period ending July 31, 2015, the Employer performed services valued in excess of \$50,000 in States other than the Commonwealth of Virginia.

Upon receipt of this Stipulation by the hearing officer it may be admitted, without objection, as a Board exhibit in this proceeding.



For the Employer



For the Petitioner

RECEIVED:

Hearing Officer

Date:

Board Exhibit No.

2

Board
2
re 2/11/16

**EMPLOYER EXHIBITS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

Case No.: 05-RC-155713

THESIS PAINTING, INC.

Employer

And

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51**

Petitioner

Place: Washington, DC

Date: 08/21/15

OFFICIAL REPORTERS

**Veritext National Court Reporters
Mid-Atlantic Region
1250 Eye Street, NW – Suite 1201
Washington, DC 20005
888-777-6690**



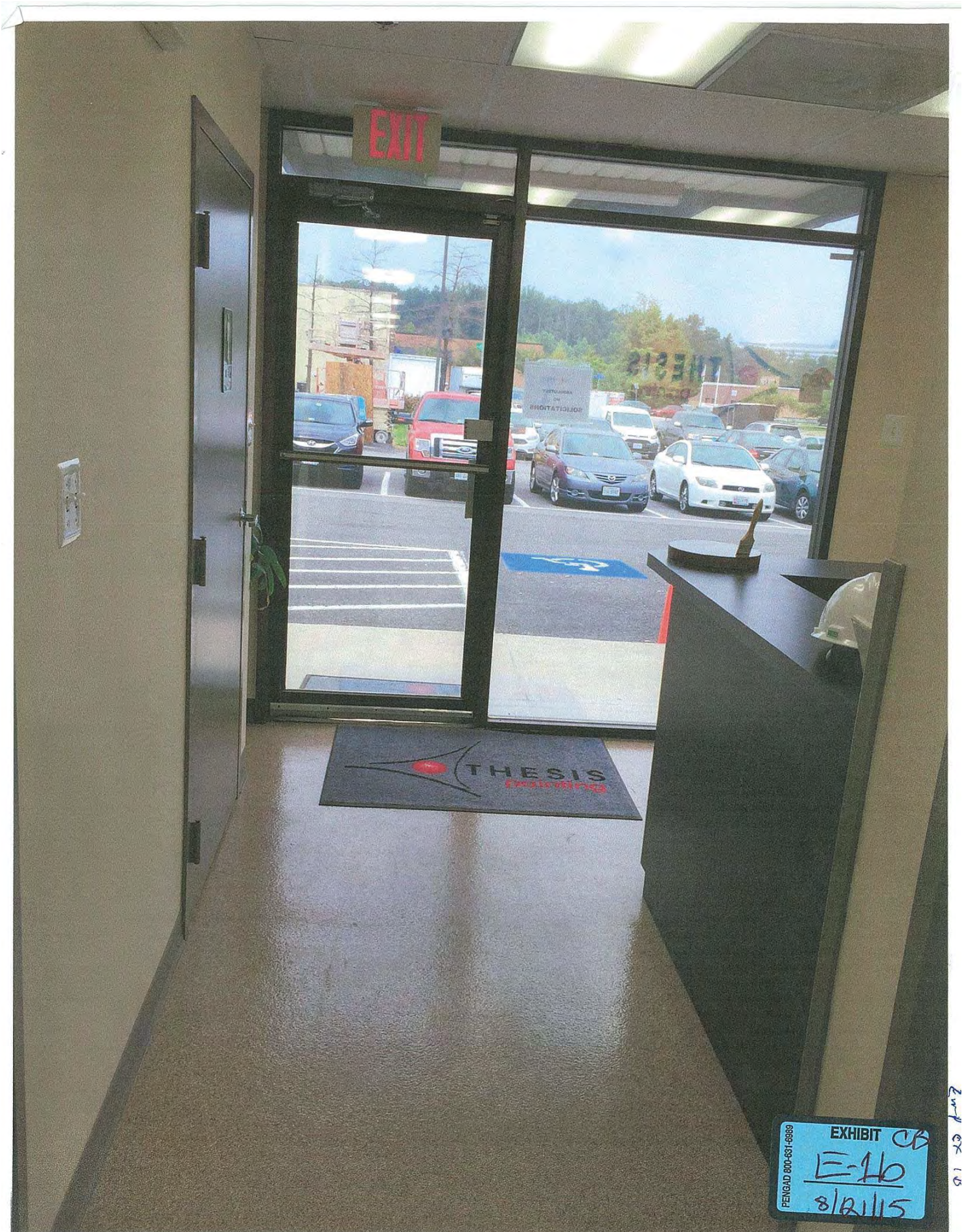


EXHIBIT CB
E-16
8/12/15
PENGAD 800-631-6939

2nd of 15

RECEIVED
BALTIMORE
JUL 9 2015
5:20 PM

**REJECTED EXHIBITS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

Case No.: 05-RC-155713

THESIS PAINTING, INC.

Employer

And

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51**

Petitioner

Place: Washington, DC

Date: 08/21/15

OFFICIAL REPORTERS

**Veritext National Court Reporters
Mid-Atlantic Region
1250 Eye Street, NW – Suite 1201
Washington, DC 20005
888-777-6690**

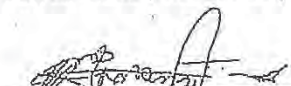
AFFIDAVIT

I, Juan Carlos Carranza Arias, have been informed that Thesis Painting, Inc. (the Company) is investigating conduct related to the National Labor Relations Board election. I have been advised that I do not have to answer any questions but have voluntarily chosen to do so. I have also been informed that the Company has no interest in knowing whether I or any employee supports the Union, and there will be no reprisals against me for any answers I may give (or not give) to the Company's questions. The only purpose of the questions is to find out whether any actions related to the election could have improperly affected the outcome.

Based upon personal knowledge, I swear under penalties of perjury that the follow statement is true:

1. I am painter working for Thesis Painting.
2. On July 31, 2015, an election was held to decide whether the Painters Union should represent employees of the Company. The vote was held at the Company's office in Springfield, Virginia.
3. We voted in the conference room, about 10-12 feet away from the front door of the building.
4. After I arrive to vote and on my way out during the voting times, I saw union agents standing outside the front door, where they talked to voters as they entered the building. Every time an employee came in to vote, the two union agents talk to the voters as they came in. Anyone who wanted to vote had to walk past the union agents to go through the door to vote.
5. During the vote, I saw some Company employees standing in the lobby area between the front door and the conference room. They changed their white company T-shirts to black union shirts. They stood between the front door and the voting area a few feet away, The voters had to go through them as they were told how to vote.
6. I knew the men were union agents because they were the ones visiting us at our homes and I saw them talking to the painters outside our jobs.

I swear under penalties of perjury that this statement is true.



Juan Carlos Carranza Arias

8 - 06 - 15
Date

Rejected
Union 1
8/21/15
CB

Union Ex 1

FORM NLRB-502 (RC)
(4-15)UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

5-RC-155713

Date Filed

7/9/15

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer

Thesis Painting, Inc.

2b. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code)

7401-D Fullerton Road, Springfield, VA 22153

3a. Employer Representative - Name and Title

Barbara Spyridakis, Owner

3b. Address (If same as 2b - state same)

SAME AS ABOVE

3c. Tel. No.

703-440-5900

3d. Cell No.

3e. Fax No.

703-440-5929

3f. E-Mail Address

Barbara@ThesisPainting.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Painting contractor

4b. Principal product or service

Painting services

5a. City and State where unit is located:

Springfield, VA

5b. Description of Unit Involved

Included: All full-time and regular part-time painters employed by the Employer.

Excluded: All estimators, office-clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

6a. No. of Employees in Unit:

40

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One: ☒ 7a. Request for recognition as Bargaining Representative was made on (Date) 07-09-2015 and Employer declined recognition on or about No reply (Date) (If no reply received, so state).

☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel. No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

None

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11b. Election Date(s):

July 29, 2015

11c. Election Time(s):

11d. Election Location(s):

12a. Full Name of Petitioner (including local name and number)

International Union of Painters and Allied Trades, AFL-CIO, District Council 51

12b. Address (street and number, city, state, and ZIP code)

4700 Boston Way, Lanham, MD 20706

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (If none, so state)

International Union of Painters and Allied Trades, AFL-CIO

12d. Tel. No.

301-918-0182 ext. 117

12e. Cell No.

240-508-9834

12f. Fax No.

301-918-3177

12g. E-Mail Address

SBAiza@Verizon.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title

Sandro Baiza, Marketing Representative

13b. Address (street and number, city, state, and ZIP code)

SAME AS ABOVE

13c. Tel. No.

SAME AS ABOVE

13d. Cell No.

SAME AS ABOVE

13e. Fax No.

SAME AS ABOVE

13f. E-Mail Address

SAME AS ABOVE

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Sandro Baiza

Signature

Title

Marketing Representative

Date

07-09-2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

Thesis Painting, Inc.

Case 05-RC-155713

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Employer, Thesis Painting, Inc., a Virginia corporation with an office and place of business in Springfield, Virginia, is engaged in the business of providing commercial painting services throughout the Washington D.C. metropolitan area, including Virginia and Maryland. In conducting its operations during the 12-month period ending June 30, 2015, the Employer performed services valued in excess of \$50,000 in States other than the Commonwealth of Virginia.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

DATE: FRIDAY, July 31, 2015 HOURS: 3:00 pm – 5:00 pm

PLACE: The conference room at the Employer's facility located at 7401-D Fullerton Dr., Springfield, VA 22153

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time painters and lead painters employed by the employer, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending July 12, 2015**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Initials: _____

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Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51? The choices on the ballot will be "Yes" or "No"

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

9. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

Initials: _____

10. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

11. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

12. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

Thesis Painting, Inc.

(Employer)

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

(Petitioner)

By /s/ Tony R. Skogen, Esq. 7/17/15
(Name) (Date)

By /s/ Sandro Baiza 7/15/15
(Name) (Date)

(Union)

Recommended: /s/ Katrina H. Ksander

7/15/15

Katrina H. Ksander, Field Attorney (Date)

By _____
(Name) (Date)

Date approved: 7/17/2015



Regional Director, Region 05
National Labor Relations Board

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THESIS PAINTING, INC.

Employer

and

Case 05-RC-155713

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On July 31, 2015, an agent of Region Five conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted for representation by the Petitioner. However, the Employer contests the results of the election claiming that the Petitioner engaged in objectionable conduct, and therefore asks that the election be set aside and that a new election be held. Specifically, the Employer contends that the Petitioner and/or its agents and supporters improperly engaged in electioneering, pressure, or surveillance immediately outside the polling area while employees were waiting to vote or on their way to vote. The petition was filed on July 9. The undersigned will consider on its merits only objections that alleged interference that occurred during the critical period that begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453.

After conducting the hearing and carefully reviewing the evidence as well as oral arguments made by the parties, I recommend that the Employer's objections be overruled because the evidence is insufficient to show that the Petitioner engaged in objectionable conduct. More specifically, I do not find credible evidence in the record to establish that any Petitioner agent or third party conduct reasonably tended to interfere with employees' free choice in the election.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections. Then I describe the Employer's operation and an overview of relevant facts. Finally, I discuss the objections.

PROCEDURAL HISTORY

The Petitioner filed the petition on July 9, 2015. The parties agreed to the terms of an election and the Region approved their agreement on July 17, 2015. The election was held on July 31, 2015. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

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All full-time and regular part-time painters and lead painters employed by the employer, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 21 ballots were cast for the Petitioner, and that 11 ballots were cast against representation. There were five non-determinative challenged ballots. Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

The Employer filed timely objections. The Regional Director for Region Five ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on August 21, 2015. The parties were not permitted to file briefs, but were allowed to provide oral arguments prior to the close of the hearing.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS DUE TO THE CONDUCT OF A PARTY

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the

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misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS DUE TO THIRD-PARTY CONDUCT

When there is no evidence that a party is involved in alleged misconduct the test to be applied is "whether the misconduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." (citations omitted.) *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also, *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002). Further, "[c]ourts are hesitant to overturn elections when statements cannot be attributed to the union because 'there generally is less likelihood that they affected the outcome.'" *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982), quoting *NLRB v. Mike Yurosek & Sons*, 597 F.2d 661, 663 (9th Cir.), cert. denied 444 U.S. 839 (1979). Thus, "inasmuch as a union (or an employer) cannot control nonagents, there are equities that militate against taking away an election victory because of conduct by a nonagent." *Cal-West Periodicals*, 330 NLRB 599, 600 (2000).

With regard to threats by non-agents, in determining the seriousness of threats, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR ESTABLISHING AGENCY STATUS

The burden of proving an agency relationship rests with the party asserting its existence, both as to the existence of the relationship and as to the nature and extent of the agent's authority. *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party.

Agency is not established merely on the basis that employees are engaged in "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988); see also *Tuf-*

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Flex Glass v. NLRB, 715 F.2d 291, 296 (7th Cir. 1983). Attending organizing meetings or soliciting cards on behalf of a union do not, standing alone, render employees agents of a union. *Health Care and Retirement Corporation of America v. N.L.R.B.*, 255 F.3d 276 (6th Cir. 2000).

The Board applies common law principles of agency in determining whether an employee is acting with apparent authority on behalf of a party when the employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Millard Processing Services*, 304 NLRB 770, 771 (1991) (citing Restatement 2d, Agency, 27 (1958, Comment)). Two conditions must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party; and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* (citing Section 8 of the Restatement). Thus, the Board's test for determining whether an employee is an agent of a party is whether, under all the circumstances, employees would reasonably believe that the employee in question is reflecting policy and speaking and acting for the party. *Waterbed World*, 286 NLRB 425, 426-427 (and cases cited therein) (1987), *enfd.* 974 F.2d 1329 (1st Cir. 1992). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).

THE EMPLOYER'S OPERATION

The Employer, Thesis Painting, Inc., a Virginia corporation with an office and place of business in Springfield, Virginia, is engaged in the business of providing commercial painting services throughout the Washington D.C. metropolitan area, including Virginia and Maryland. In conducting its operations during the 12-month period ending July 31, 2015, the Employer performed services valued in excess of \$50,000 in States other than the Commonwealth of Virginia.

THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony. Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of the witnesses at the hearing. Failure to detail all conflicts in testimony does not

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mean that such conflicting testimony was not considered. *Bishop & Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

Employer Objections 1 and 2 deal with the alleged activity of agents and/or representatives of the Petitioner, employees who were its agents and/or representatives of the Petitioner, or alternatively through employees who supported the Petitioner. Specifically, the Employer alleges the aforementioned individuals engaged in conduct that affected employees' free choice, and therefore, the results of the election should be set aside. Given that both objections alleged the same conduct and only differ in whether an agent or a third-party engaged in such conduct, they will be discussed simultaneously below.

Objection 1: During the election, the Union, through its agents and/or representatives, engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

Objection 2: During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

Record Evidence

The Employer presented employees Nelson Caceres and Juan Carranza. The Petitioner presented former employee Adan Guzman, former employee Jose Raymundo, and Union Marketing Representative Sandro Baiza. In lieu of briefs, the parties were allowed to present oral arguments prior to the conclusion of the hearing.

Caceres and Carranza are two of about five of the Employer's lead painters. Caceres has been employed by the Employer for about nine years. The record does not specify Carranza's years of service with the Employer. The record established that painters Guzman and Raymundo had been previously employed by the Employer,¹ but not on the date of the July 31, 2015 election. Additionally, Raymundo served as the Petitioner's observer for the election held from 3:00 p.m. to 5:00 p.m. in the Employer's conference room. Caceres, Carranza, Guzman and Raymundo voted during the election.

A. Oral Testimony

Caceres

Caceres testified that employee Jose Viera had informed him that Guzman had visited Viera's home on some date prior to the election held on July 31, 2015, and was accompanied by

¹ The record does not establish the specific dates of employment for either Guzman or Raymundo.

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an unnamed individual. Testimony from Guzman and Baiza confirmed that Baiza was the unnamed individual.

Caceres arrived at the polling site prior to the opening of the polls at around 2:45 p.m. in order to collect employee paychecks for distribution on the day of the election. Caceres testified he saw Raymundo wearing a white union shirt when he arrived at the polling site prior to the opening of the polls at 3:00 p.m. He further testified that Raymundo went out to his car and when he came back in, he was wearing a regular shirt with no significant labels or markings. Raymundo was not wearing a union shirt during the duration of the election. Raymundo's testimony confirms he was wearing a shirt with the Petitioner's insignia when he first arrived and then changed into a plain shirt before he served as the Petitioner's observer.

Caceres testified he was the second to vote. Immediately after voting, he went to the kitchen and distributed paychecks from about 3:00 p.m. to 5:00 p.m. Caceres left the kitchen once around 3:45 p.m. to go outside to look for an employee who did not submit a timesheet and was outside for about two minutes. He only spoke to one employee to ask if he had seen the employee Caceres was looking for. He left the kitchen one other time to use the restroom. Caceres testified he saw Guzman at the polling site between 3:00 p.m. and 4:00 p.m. Of that time, Guzman was in the lobby area directly outside the conference room where the voting was taking place. Caceres recalled that Guzman was in that area for about three minutes and was speaking to other employees. Caceres did not hear what Guzman was saying. Caceres recalls that Guzman was wearing a black shirt with the Petitioner's insignia displayed upon it for the entirety of his stay in, and directly outside, the polling area.

Caceres testified that he had not seen Guzman or Raymundo at any of the Employer's worksites after they left the employment of the Employer and that neither Guzman nor Raymundo visited Caceres's house at any time prior to the election. Caceres denied hearing Guzman or Raymundo tell any employee, including himself, how to vote in the election.

Carranza

Carranza testified he saw Guzman standing outside of the polling area around 3:05 p.m. to 3:10 p.m., when Carranza arrived at the polling site to cast his ballot. Carranza then saw Guzman speaking to one unnamed employee directly outside the building, about 10-12 feet away from the polling site. Carranza approached Guzman and the unnamed employee, but did not hear what was said. After casting his ballot, Carranza remained around the polling area for about 30 minutes, and then left the polling area to get something to eat. Carranza arrived back at the polling site area around 4:00 p.m. and Guzman was no longer outside.

Carranza also testified that when he arrived at the polling site, Raymundo was wearing a black T-shirt with the Petitioner's insignia upon it and then noticed Raymundo had changed into a "regular" T-shirt around the time of the opening of the polls at 3:00 p.m.

Carranza testified that he had not seen Guzman or Raymundo at any of the Employer's worksites after they left the employment of the Employer and that neither Guzman nor

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Raymundo visited Carranza's house at any time prior to the election. Carranza denied hearing Raymundo tell any employee, including himself, how to vote in the election.

Guzman

Guzman testified that prior to the July 31, 2015 election, he visited the house of employee Viera to talk to him about the Union and showed Viera a copy of his paycheck he received as an employee of another painting company, Federal Painting.² Guzman testified he told Viera he was getting paid more at Federal, but had only discussed this with Viera. Guzman denied visiting worksites of the Employer to talk to employees about the union or showing employees copies of his paychecks from Federal Painting at any time after he left the employment of the Employer.

Guzman testified he arrived at the polling site at about 3:00 p.m., voted, and then left the parking lot to go home. He recalled he may have been around the polling site for a total of 10 minutes. He saw some employees around the polling site, shook their hands, and then left to go home. He denies he wore a shirt with the Petitioner's insignia displayed upon it or owning a union shirt. He denied speaking to employees at the polling and that he only shook the hands of some employees who were present.

Raymundo

Raymundo testified he currently works for Federal Painting. He arrived at the polling area around 2:00 p.m. but did not engage in conversations with any employees between the 2:00 p.m. to 3:00 p.m. Raymundo confirms he was wearing a T-shirt with the Petitioner's insignia upon it when he arrived but changed into a nondescript T-shirt after directed to do so by the Board agent conducting the election. During the time it took Raymundo to exit the polling site, walk to his vehicle to change his shirt and return to the polling site, he recalls seeing about 10 employees around the polling site waiting to cast their ballots. After changing his shirt immediately preceding the opening of the polls, Raymundo returned to the polling site and served as the Petitioner's observer from 3:00 p.m. to 5:00 p.m.

Baiza

Baiza is employed by the Petitioner and works as a marketing representative for the Petitioner and served as its lead organizer for this organizing campaign. He testified that about five days prior to the election, he called Guzman and asked him if he would accompany him on house calls to employees on the voter list. Guzman accompanied Baiza on a house call to employee Viera. Baiza denied ever instructing Guzman or any other person — prior to, or on the day of the election — to speak to employees about how to vote in the election.

Baiza arrived in the parking lot adjacent to the polling site on the day of the election around 2:25 p.m. He was accompanied by four nonemployees. Of the four nonemployees, two of them accompanied Baiza at the pre-election conference. Baiza and the four nonemployees left

² An admitted unionized painting company.

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the polling area around 2:55 p.m. and did not return until the conclusion of the election around 5:00p.m. Baiza denied speaking to any employee or nonemployee who was voting in the July 31, 2015 election.

B. Oral Arguments

Employer

The Employer argues that the testimony established that Guzman and Raymundo were union agents or representatives engaged in improper electioneering or surveillance, and that either conduct is sufficient to overturn the results of the election held on July 31, 2015. In support of its argument, the Employer relies primarily on *Milchem, Inc.*, 170 NLRB 362 (1968) and *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir.2001). Other cases were cited, but will not be discussed below in my analysis or recommendation.³

The Employer argues that under *Milchem*, the rule of thumb is 50 feet from the voting area. Based on the pictures provided as Employer exhibits 1 and 2, and through testimony, the distance from the conference room where the voting took place to the front entrance of the Employer's office is estimated at about 10 feet. Further, agents or representatives of the Petitioner communicating with employees in or around the area described, regardless of what was said, are in violation of the *Milchem* rule.

In support of its surveillance allegation, the Employer argues that in the *Nathan Katz* case, the court said, relying in part on the Board's previous ruling in *Electric Hose & Rubber*, 262 NLRB 186 (1982), that a person is improperly stationed, a person of interest, or a representative or agent of the Union, if they are stationed at a spot where the voters have to go by them in order to get into the voting area, whether it's an employer supervisor or a union representative; this by itself is a violation and requires setting aside the election. The Employer argues that based on the credible evidence, Guzman was at the polling site for at least one hour and was positioned in such a way that voters had to pass him in order to cast their ballots.

Additionally, the Employer argues that even if I do not find Guzman and/or Raymundo to be agents or representatives of the Petitioner, the mere presence of union supporters, who are among employees in such proximity to the polling site, and who are engaging in electioneering and/or surveillance, is conduct sufficient to overturn the results of the election.

Therefore, the Employer argues it has established Petitioner conduct sufficient to set aside the results of the election.

Petitioner

The Petitioner argues there is no credible evidence of its involvement with any alleged electioneering that took place in or around the polling area on the day of the July 31, 2015 election. Crediting the testimony of Guzman, the Petitioner argues he was at the polling site for

³ Additional Employer case citations are provided on pages 79 and 80 of the transcript of the hearing conducted on August 21, 2015.

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about 10 minutes and shook hands with some employees, but did not speak to any employee on how to vote. Finally, the Petitioner argues the Employer could not establish a second alleged union agent exists. Therefore, the Petitioner argues the objections are without merit.

Analysis and Recommendation Regarding Agency Status

The testimony demonstrated that Guzman and Baiza made a single house call to employee Jose Viera during the critical period. During the house call, Guzman, who was employed by Federal Painting,⁴ admits to showing Viera a copy of a paycheck Guzman earned as an employee of Federal Painting, and Guzman informed Veira he was paid more at Federal Painting than he was paid when he worked for the Employer. There was insufficient evidence to suggest that either Guzman or Raymundo visited the Employer's worksites sites during the critical period and showed employees paychecks earned as employees of Federal Painting. As mentioned above, agency is not established merely on the basis that employees are engaged in "vocal and active union support." *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988). Instead, apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Millard Processing Services*, 304 NLRB 770, 771 (1991). At no time, including that at which Guzman made a house call to Viera, did any known agents of the Petitioner manifest to Viera or any other third party that Guzman was speaking on behalf of the Petitioner. It is undisputed that on the day of the July 31 election, Raymundo arrived to the polling site wearing a T-shirt with the Petitioner's insignia displayed. Prior to the opening of the polls, Raymundo was instructed by the Board agent conducting the election to change his T-shirt. Raymundo left the polling area, went to his car and changed into a nondescript T-shirt, and returned to the polling area and served as the Petitioner's observer during the election. Raymundo passed about 10 employees waiting to cast their ballots during the time it took to change his T-shirt. There was no evidence presented to suggest Raymundo spoke to any employees on behalf of the Petitioner during the critical period. Considering all the circumstances, I find that employees would not have reasonably believed that Guzman or Raymundo were speaking on behalf of the Petitioner at any time. Therefore, any conduct attributed to Guzman or Raymundo must be analyzed under the Board's standard governing third party conduct.

Analysis and Recommendation Regarding the Alleged Conduct

I must apply the Board's objective-based standards for evaluating alleged objectionable conduct in order to make my recommendations. As explained above, I shall analyze the conduct allegedly engaged in by Adan Guzman and Jose Raymundo under the Board's rules governing third-party conduct, i.e., whether the misconduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, above.

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The Board's rule announced in *Milchem, Inc.*, 170 NLRB 362 (1968) applies to conduct by a party to the election, where an agent or representative of that party engages in prolonged conversations with voters in close proximity to the polls during a substantial part of the voting period. Regardless of the content of the conversations, such conduct may result in the election results being set aside.

The *Milchem* rule does not apply to third -party conduct, and therefore, does not apply to this proceeding. Further, the violative conduct found in *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir.2001), also applies to conduct by a party representative or agent. A third party can be an employee of the employer who has no actual or apparent authority to act for either party. *Corner Furniture Discount Center*, 339 NLRB 1122 (2003). The Board accords less weight to such conduct than to conduct directly attributable to the parties. *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958). The Board considers the evidence of fear and coercion in determining whether third party interference is sufficient to warrant setting aside the election and whether the conduct complained of was so related to the election as to have a probable effect on the employees' actions at the polls or precluded employees from exercising free choice. *Monroe Auto Equipment Co.*, 186 NLRB 90 (1970). The Board considers the cumulative incidents and objections, rather than the isolated individual incidents of conduct and attributes less weight to the pro -union employee" conduct outside the polling area.

The Board applies a different—and more lenient—standard to electioneering conduct of third parties than to parties and representatives of parties. *Rheem Mfg. Co.*, 309 NLRB 459 (1992). The Board in *Rheem* refused to extend the *Milchem* rule to conduct of nonparties. The Board stated that the proper third-party standard is “ ‘whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.’ ” *Rheem, above*, at 463 (quoting *Southeastern Mills*, 227 NLRB 57, 58 (1976)). See also *Crestwood Convalescent Hosp.*, 316 NLRB 1057, 1057 (1995) (pro-union employees who “walked among about 25 employees and talked to them as they waited in line to vote” did not “substantially” impair “employees’ free choice”); *O'Brien Mem'l*, 310 NLRB 943 (1993) (pro-union employees who gathered in employer's parking lot and chanted “vote yes” during election did not violate *Milchem* because they were outside polling area and there was no evidence that they could be heard inside). The court in *NLRB v. Duriron Co.*, 978 F.2d 254 (6th Cir. 1992), enforcing 303 NLRB No. 124 (1991), found the presence of some pro-union employees in hallway outside the voting area did not interfere with employees’ free choice. In *Colquest Energy v. NLRB*, 965 F.2d 116 (6th Cir. 1992), denying enforcement on other grounds, 302 NLRB No. 166 (1991), the court found pro-union employees standing near polls wearing union hats and insignia who urged employees to vote for union did not interfere with employees’ ability to make free choice.

Crediting the testimony of Caceres, Guzman was situated directly outside the conference room designated as the polling area for about three to four minutes, speaking to employees waiting in line to cast their ballots, but any alleged statements made by Guzman were inaudible from where he was located. The testimony of Carranza places Guzman around the polling area for a period of about 45-60 minutes, to include occupying the area directly outside the Employer's office and being seated in his vehicle in the parking lot. Carranza also testified that

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any alleged statements made by Guzman were inaudible from where he was located. None of the testimony suggests Raymundo was engaged in any sort of conversation or spoke to employees on the day of the election. The Employer's witnesses testified that both Guzman and Raymundo were wearing T-shirts displaying the Petitioner's insignia. Guzman denied wearing a T-shirt with the Petitioner's insignia. Raymundo confirmed he arrived at the polling site wearing a T-shirt with the Petitioner's insignia but changed into a nondescript T-shirt prior to the opening of the polls.

Surveillance

The Employer submits that during the times the polls were open, Guzman, who was acting as an agent or representative of the Petitioner, was posted within about 10 feet of the conference room in which the election was held, and that employees present to vote had to pass by him in order to cast their ballots. As described above, I did not find Guzman to be an agent of the Petitioner. Even assuming I found Guzman an agent of the Petitioner, absent evidence of coercion or other objectionable conduct, an agent of a union posted within close proximity to a polling site is insufficient to warrant setting aside the election. See e.g., *C & G Heating and Air Conditioning*, 356 NLRB No. 133, slip op. at 2 (2011) (union representative's presence 77 feet from entrance to polling site not objectionable); *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982) (electioneering by union agents 10 feet from polling place not objectionable), *enfd.* 703 F.2d 876 (5th Cir. 1983).

Upon review of the entire record, I find that none of the conduct alleged in the Employer's Objection 1 or Objection 2 sufficient to warrant setting aside the July 31 election. Thus, having considered the entire record, and based on the foregoing analysis, I recommend that the Employer's Objection 1 and Objection 2 be overruled in their entirety.

CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. The Employer has failed to establish that its objections to the election held on July 31, 2015, reasonably tended to interfere with employee free choice. Therefore, I recommend that an appropriate certification issue.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 05 by **October 6, 2015, at 5:00p.m. (ET)**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions

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should be addressed to the Regional Director, National Labor Relations Board, [Regional address].

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business **October 6, 2015, at 5:00p.m. (ET)** on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: September 22, 2015

/s/ SCOTT Y. BRYSON

Scott Y. Bryson, Field Examiner
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

In the Matter of:

THESIS PAINTING, INC.,

Employer

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Petitioner.

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Case No. 05-RC-155713

**EMPLOYER’S EXCEPTIONS TO THE HEARING OFFICER’S REPORT ON
OBJECTIONS TO THE ELECTION**

Thesis Painting, Inc. (“Thesis” or “the Employer”), by its attorneys, hereby submits its exceptions to the Hearing Officer’s Report on Objections to the Election, pursuant to Sections 102.67 and 102.69 of the Board’s Rules and Regulations. The Hearing Officer recommended that the Employer’s Objections be overruled in their entirety. The Employer specifically excepts to the following findings (or lack of findings) by the Hearing Officer:

1. On page 2 of the Hearing Officer’s Report on Objections, he incorrectly applied a “strong presumption” in favor of upholding an election that does not apply under the circumstances of this case, where the objection is based upon the Board’s decision in *Milchem, Inc.*, 170 NLRB 362 (1968) (declaring a “strict rule” against conversations by union agents with voters waiting in line to vote in elections).

2. Similarly on pages 2-3, the Hearing Officer improperly applied an “objective” test for finding coercion of employees during an election, and/or a 9-part test for unlawful election interference, neither of which is irrelevant to a *Milchem* violation.
3. On page 5, the Hearing Officer’s description of the employment status of union agents Guzman and Raymundo failed to acknowledge that both admitted in their testimony to having resigned from their employment by Thesis prior to the election, meaning that neither employee was eligible to vote in the election, even though both cast ballots.
4. On page 6, in describing Nelson Caceres’s testimony, the Hearing Officer stated that Caceres did not hear what union agent Guzman said to employees, though he could tell that Guzman was talking to employees waiting to vote. The Hearing Officer failed to report that Caceres was told by a co-worker that Caceres asked him why he had not returned his calls, which the co-worker connected to Guzman’s previous home visit together with the union’s marketing director.
5. On page 9, the Hearing Officer erroneously found that “at no time ... did any known agents of the Petition manifest to Viera or any other third party that Guzman was speaking on behalf of the Petitioner.” To the contrary, Union marketing director Baiza plainly brought Guzman to visit Viera for the express purpose of telling the latter that he would make more money working for the union, and Baioza manifested by his joint presence with Guzman that Guzman was an agent of the Union speaking on the union’s behalf.
6. On page 9, the Hearing Officer erroneously found that union observer and agent Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt.

7. On page 9, the Hearing Officer erred in finding that “employees would not have reasonably believed that Guzman or Raymundo were speaking on behalf of the Petitioner at any time;” and in failing to find that former employees Guzman and Raymundo were both agents of the union based upon apparent authority.
8. On pages 10 and 11, the Hearing Officer erroneously failed to apply either the *Milchem* no-conversation rule or the *Nathan Katz Realty* rule prohibiting election surveillance, based upon his erroneous findings that Guzman and Raymundo were not union agents.
9. On page 10, the Hearing Officer mischaracterized employer witness Cacaresh’s testimony, which he credited, as to how long Mr. Guzman was present within 10 feet of the polling area. Compare findings on page 6 stating that Cacaresh testified that Guzman was present just outside the clear glass front door for an hour while voting was going on and entered the lobby area for several minutes so as to be cast a ballot even though he had resigned his employment and was not eligible to vote; with the finding on page 10 that Guzman was only within proximity to the polls for a few minutes.
10. On page 11, the Hearing Officer failed to discredit union agent Guzman’s denial that he was wearing a union T-shirt while he stood in proximity to the polls and spoke to voters. Both Caceres and Carranza testified that Guzman wore the union T-shirt in close proximity to the polls. The Hearing Officer credited their testimony on other issues but failed to make any credibility findings on this contradiction in the record.
11. Throughout the Report, the Hearing Officer failed to make credibility findings adverse to the Union witnesses, particularly Mr. Guzman, though his testimony was contradicted by both Caceres and Carranza and by the Union’s own marketing director, Mr. Baiza. The Hearing Officer further erred in failing to draw adverse inferences from the discredited

nature of Guzman's testimony, including his false denial that he spoke to co-workers on at or near the polls, his false denial that he visited a co-worker's home at the request of union marketing direct Baiza and was held out by the union as speaking on its behalf, and that he (Guzman) wore union insignia and spent an hour within 10 feet of the polling area, stationing himself at the entrance where every voter had to pass by him during that time. *Hearing Officer's Guide* at 147-148.

12. On page 11, the Hearing Officer erroneously found that even if Guzman was an agent of the union his stationing himself within 10 feet from the polling place and engaging in improper surveillance of the voters was not objectionable.
13. On page 11, based upon all of the erroneous findings cited above, the Hearing Officer erred in recommending that the Employer's Objection 1 and Objection 2 be overruled in their entirety.

Wherefore, for the reasons set forth above and in the Employer's Brief in Support of the Exceptions, the Hearing Officer's Report on the Employer's Objections should itself be overruled and the election should be set aside.

/s/ Maurice Baskin

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Attorney for the Employer

October 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing exceptions have been served by electronic mail and/or first class mail on the following this 6th day of October, 2015:

Michael S. Melick
Barr & Camens
1025 Connecticut Ave., N.W., Suite 712
Washington D.C., 20036
Attorney for Painters District Council 51

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/s/Maurice Baskin

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THESIS PAINTING, INC.

Employer

and

Case 05-RC-155713

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

Petitioner

**DECISION AND
CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Stipulated Election Agreement, an election was conducted on July 31, 2015 in a unit of Thesis Painting, Inc.'s (the Employer) full-time and regular part-time painters and lead painters, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act. The tally of ballots showed that of the approximately 32 eligible voters, 21 cast ballots for the International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (the Petitioner), and 11 cast ballots against representation. There were 5 challenged ballots, a number insufficient to affect the results of the election. Therefore, the Petitioner received a majority of the votes.

The Employer timely filed two objections. On August 12, 2015,¹ I ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. On August 21, the Hearing Officer designated to conduct the hearing heard testimony and received into evidence relevant documents. The parties were not permitted to file briefs, but were allowed to provide oral arguments prior to the close of the hearing. Subsequently, on September 22, the Hearing Officer issued a report in which he recommended overruling the objections in their entirety.

On October 6, the Employer filed 13 exceptions to the Hearing Officer's recommendations. In its exceptions, the Employer contends that the Hearing Officer erred in:

(1) incorrectly applying a strong presumption in favor of upholding an election that does not apply under the circumstances of this case, where the objection is based upon *Milchem, Inc.*, 170 NLRB 362 (1968);

(2) improperly applying an "objective" test for finding coercion of employees during an election, and/or a 9-part test for unlawful interference;

¹ Unless otherwise noted, all subsequent dates are 2015.

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(3) failing to acknowledge that two former employees, Adan Guzman and Jose Raymundo, admitted to resigning from their employment prior to the election;

(4) failing to acknowledge that employee Nelson Caceres was told by a co-worker that Caceres asked him why he had not returned his calls;²

(5) erroneously finding that “at no time. . . did any known agents of the Petition[er] manifest to [employee Jose] Viera or any other third party that Guzman was speaking on behalf of the Petitioner,”;

(6) erroneously finding that the Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt;

(7) erroneously finding that “employees would not have reasonably believed that Guzman and Raymundo were speaking on behalf of the Petitioner at any time” and failing to find that former employees Guzman and Raymundo were both agents of the union based upon apparent authority;

(8) erroneously failing to apply either the no-conversation rule of *Milchem* or the rule of *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001) prohibiting election surveillance

(9) mischaracterizing Caceres’s testimony as to how long Guzman was present within 10 feet of the polling area

(10) failing to discredit Guzman’s denial that he was wearing a union T-shirt while he stood in proximity to the polls and spoke to voters;

(11) failing to make credibility findings adverse to the Petitioner’s witnesses, particularly Guzman, and failing to draw adverse inferences from the discredited nature of Guzman’s testimony;

(12) erroneously finding that even if Guzman was an agent of the Petitioner, his stationing himself within 10 feet from the polling place and engaging in surveillance of the voters was not objectionable; and

(13) based upon all of the erroneous findings cited above, erring in recommending that the Employer’s Objection 1 and Objection 2 be overruled in their entirety.

The Petitioner filed a brief in opposition to the Employer’s exceptions on October 15.

² The Employer’s exception #4 is that “[t]he Hearing Officer failed to report that Caceres was told by a co-worker that Caceres asked him why he had not returned his calls, which the co-worker connected to Guzman’s previous home visit together with the union’s marketing director.” However, based on my review of the Employer’s supporting brief (at p. 2) and the record, it seems apparent that the Employer’s exception is that the Hearing Officer did not acknowledge the record evidence that Caceres was told by a co-worker that *Guzman*, not Caceres, asked the co-worker why the co-worker had not returned Guzman’s calls.

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I have reviewed the record in light of the exceptions and briefs, and adopt the Hearing Officer's findings and recommendations to the extent consistent with this Decision. I find that the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTIONS

- Objection 1. During the election, the Union, through its agents and/or representatives, engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.
- Objection 2: During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

At root, the Employer contends that on the day of the July 31 election, former employees Adan Guzman and Jose Raymundo engaged in objectionable electioneering and surveillance during the election within ten feet of the polling area. The Employer further contends that Guzman and Raymundo are agents and/or employees of the Petitioner, and that employees would have reasonably believed Guzman and Raymundo were speaking on behalf of the Petitioner during the election period. Regarding Guzman, the Employer alleges that he wore a T-shirt with union insignia on it and stood outside of the polling area for an hour talking to employees who were lined up and entering to vote. The Employer further alleges that Guzman went to the home of at least one employee to solicit support for the Petitioner. Similarly, the Employer contends that Raymundo, who served as an observer for the Petitioner in the election, engaged in prohibited electioneering by walking by a line of employees waiting to vote while wearing a T-shirt with union insignia on it.

In its exceptions, the Employer contends that the Hearing Officer made incorrect findings of fact and applied incorrect standards of law in assessing the burdens of proving conduct that required the election to be set aside under *Milchem, Inc.* and *Nathan Katz Realty*. In particular, the Employer's core contention is that the Hearing Officer erred in failing to find that individuals who were held out as the Petitioner's agents engaged in prohibited electioneering and surveillance during the election. Thus, the Employer's argument as to why the election should be set aside hinges almost entirely on establishing the agency of either of two individuals.

II. ANALYSIS

Based upon my review of the record and the Employer's exceptions and supporting briefs, I conclude that the Employer did not meet its burden of proving that Guzman and Raymundo are agents of the Petitioner. I further find that the record supports a conclusion that neither engaged in improper electioneering, coercion, nor surveillance.

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As the Hearing Officer correctly noted, “there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). The Employer is correct to note that in *Milchem*, supra, the Board promulgated a strict rule that a party to an election engages in objectionable conduct when one of its supervisors or agents engages in sustained conversations with employees who are waiting to cast ballots. The Board held “that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations.” *Milchem*, supra at 362. However, the Employer’s first exception is misplaced. In my view, rather than the selection of the incorrect legal standard, all the Hearing Officer described in that portion of his report were more generalized legal principles of the burdens and standards for setting aside an election conducted by the Board. The Hearing Officer was clearly cognizant of *Milchem*, as he later described its rule and why he found it to be inapplicable based on his conclusions that the Employer did not meet its burden of establishing that either Guzman or Raymundo are agents of the Petitioner.

Generally, the Board applies an objective test in evaluating a party’s conduct during the critical period surrounding an election, i.e., whether the conduct has “the tendency to interfere with the employees’ freedom of choice.” *Cedars-Sinai Medical Center*, 342 NLRB 596, 602 (2004) (quoting *Cambridge Tool Mfg.*, 316 NLRB 716 (1995)). In doing so, the Board considers the nine factors correctly identified by the Hearing Officer. Accordingly, I reject the Employer’s second exception to the Hearing Officer’s mere articulation of the nine-part test for evaluating whether a party’s conduct reasonably tended to interfere with employees’ free choice in the election. While the Employer alleges the objective test is irrelevant to the question of whether the *Milchem* rule was violated, it is quite clear that the Hearing Officer was not applying the rules of *Milchem* or *Nathan Katz Realty* because the Hearing Officer determined that a standard for evaluating the conduct of a party to the election was not applicable.

The Employer’s next two exceptions concern the Hearing Officer’s treatment of record evidence. For its third exception, the Employer essentially argues that the Hearing Officer omitted to mention that both Guzman and Raymundo were no longer employed by the Employer at the time of the election. I disagree, as the Hearing Officer clearly described how both Guzman and Raymundo were previously employed by the Employer, but not on the date of the election. As for its fourth exception regarding the Hearing Officer’s failure to include hearsay evidence in his factual narrative, I note that while hearsay may be received into evidence at a representation case hearing at the discretion of the hearing officer, the Board has given hearsay lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (describing that administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). Here, Caceres testified that his co-worker told Caceres that Guzman had visited the co-worker’s home before the election. Caceres further testified that he heard that Guzman was asking employees why they had not returned his calls. On this record, I conclude that it was not an error for the Hearing Officer to not include the hearsay evidence in his factual narrative. As the Hearing Officer’s

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Report suggests, he did not include the entirety of evidence, but omitted to discuss certain evidence that he found to be irrelevant, cumulative, or otherwise of little probative value.

The Employer's fifth, sixth, and seventh exceptions revolve around the Hearing Officer's finding that the Employer failed to meet its burden of establishing the agency of either Guzman or Raymundo. As the Hearing Officer correctly noted previously in his report, the burden of proving an agency relationship is on the party asserting its existence. *Cornell Forge Co.*, 339 NLRB 733 (2003) (citing *Millard Processing Services*, 304 NLRB 770, 771 (1991) (citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948)). In evaluating whether an individual is an agent of a union, the Board applies common law principles. Accordingly, a party asserting agency status may meet its burden of proof by establishing that the alleged agent held apparent authority, such as by evidence that the principal created a reasonable basis for a third party to believe that the alleged agent is authorized to act on behalf of the principal.

Regarding Guzman, the Hearing Officer explicitly relied on the testimony about Guzman making a single house call to employee Jose Viera, where Guzman showed Viera a copy of a paycheck Guzman earned while working for a another employer. The Employer alleges that the Petitioner's marketing director, Sandro Baiza, plainly brought Guzman to visit Viera for the purpose of informing Viera that he would make more money working for a unionized employer. Baiza testified that he called Guzman prior to the election because Guzman knows the employees. Furthermore, Baiza testified that he only wanted Guzman's help in getting employees to open the door and listen to him because Baiza thought the employees were comfortable with Guzman. There was no further evidence to suggest that Guzman played a more active role in organizing, or that the Petitioner held Guzman out in such a role, and the Employer does not cite to any facts in its brief other than Guzman's one home visit and his presence at the place of the election. On this limited record, I cannot conclude that the Hearing Officer erred in finding that the Employer failed to meet its burden of establishing the agency status of Guzman. In so rejecting the Employer's arguments, I note that I find their cases cited to be distinguishable. I view the evidence going towards agency in *Bellagio, LLC*, 359 NLRB No. 128 (2013) to be far more substantial and specific than the scant evidence in this record, as the agent involved therein had sought to be a leader in the organizing campaign for a company that he had not worked for at any time surrounding the campaign, attended an organizing meeting, and specifically referenced the union organizer's request for the agent to contact employees (though there was no such request).³ In contrast, Guzman had only recently stopped working for the Employer at the time

³ The Employer cited *Bloomfield Health Care Center*, 352 NLRB 252 (2008), *enfd* 372 Fed. Appx. 118 (2d Cir. 2010). However, that case was decided by a Board that lacked a quorum, and it is not entirely clear to me that the Board actually sided with the employer in that case regarding the alleged agency status of an individual. That said, the facts involved an individual who served as the union's election observer, engaged in leafleting, appeared in literature, drove co-workers to the polls, and generally spoke on behalf of the union. *Bloomfield Health*, *supra* at 256. I consider that a greater evidentiary showing towards agency than is present in this case. As for *Pan-Oston Co.*, 336 NLRB 305 (2001), the Board found that the evidence was insufficient to find an individual was an agent, largely based on the lack of evidence concerning the scope of the purported agent's duties or the principal's representations to third parties concerning the purported agent's authority. As for the Employer's citation to *NLRB v. L & J Equipment Company, Inc.*, 745 F.2d 224 (3rd Cir. 1984), the Third Circuit did not decide the agency status of alleged agents, including an employee who was part of an in-house organizing committee and who spoke to employees waiting in line to vote in the election. Instead, the Third Circuit remanded the case to the Board for that question, and the Board subsequently held that the evidence was insufficient to establish the agency of the employee who allegedly violated the *Milchem* rule. *L & J Equipment Company, Inc.*, 278 NLRB 485, 487-88 (1986).

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of the election, and the remainder of the evidence going towards his alleged agency is limited to the lone home visit and his presence at the election site. In addition, even assuming Guzman engaged in telephone conversations or visits with employees in support of the Petitioner, the Board has long held that pro-union individuals do not constitute union agents merely on the basis of their "vocal and active union support." *Cornell Forge Co.*, 339 NLRB 733 (2003) (citing *United Builders Supply Co.*, 287 NLRB 1364 (1988)).

As for Raymundo, I similarly cannot conclude that the Hearing Officer erred in reaching the same conclusion. The Employer's argument in favor of Raymundo's alleged status as an agent of the Petitioner appears to entirely be based on Raymundo's wearing of a T-shirt with the Petitioner's logo at some point on the day of the election. As the Hearing Officer notes (and the Employer does not appear to take any issue with), there is no evidence suggesting that Raymundo spoke to any employees on behalf of the Petitioner during the critical period, or was held out by the Petitioner as acting in such a capacity. On this scant evidence, I agree with the Hearing Officer's conclusion that the Employer did not meet its burden of establishing the agency status of Raymundo.

I view the Employer's sixth exception as also going to the Hearing Officer's finding that Raymundo did not engage in objectionable electioneering on the day of the election. Raymundo undisputedly arrived at the polling site wearing a T-shirt with the Petitioner's insignia on it. Based on my review of the record, while several witness accounts confirm that Raymundo wore such a shirt on the day of the election, these witnesses also confirm Raymundo's claim that he changed out of the logoed shirt before the polls opened and into a plain shirt. Based on these facts, I agree with the Hearing Officer's assessment that Raymundo's wearing of a shirt with the Petitioner's logo before the election began would not have substantially impaired the employees' free choice as to require setting aside the election.

With my rejection of the Employer's exceptions concerning the alleged agency of Guzman and Raymundo, I consequently reject the Employer's eighth exception that the Hearing Officer erred by not applying the rules of *Milchem* and *Nathan Katz Realty*. Each of these rules applies to conduct of parties to an election. In accordance with the finding that the Employer failed to establish the agency of either Guzman or Raymundo, such rules are inapplicable. Therefore, I agree that the Hearing Officer analyzed their conduct under the correct standard governing third party conduct. In evaluating electioneering by such third parties, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004) (quoting *Rheem Manufacturing Co.*, 309 NLRB 459, 463 (1992)). I agree with the Hearing Officer's conclusion that the evidence does not meet this standard.

The Employer's ninth exception concerns the Hearing Officer's treatment of evidence regarding Guzman's presence in the vicinity of the polling place. Caceres admittedly did not actually hear anything that Guzman may have said to any employees. The Employer contends that Caceres testified that Guzman was present just outside the clear glass front door near the polling place for an hour while voting was going on, and that the Hearing Officer mischaracterized this testimony. Based on my review of the record I reject the Employer's exception. Caceres testified that Guzman was already present when Caceres arrived around 3:00 p.m., when the polls opened. He further testified that he saw Guzman enter the polling place to

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vote, and that Guzman then spoke to others in the lobby for a little bit and then left. Caceres then testified that around 4:00 p.m., he saw Guzman again in the office through the glass door for less than three minutes. Based on this evidence, I do not conclude that the Hearing Officer mischaracterized Caceres' testimony by construing it as having Guzman in the vicinity of the polling place for only three to four minutes.

I summarily reject the Employer's tenth and eleventh exception concerning the Hearing Officer's credibility resolutions. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the findings. Furthermore, specifically addressing the Employer's tenth exception that the Hearing Officer failed to discredit Guzman's denial of wearing a T-shirt with the Petitioner's logo in the vicinity of the polling place, I conclude that even if the Hearing Officer had discredited Guzman's denial of wearing the shirt, such would not constitute objectionable conduct that warrants setting aside the election.

As for the Employer's twelfth exception that the Hearing Officer erroneously found that even assuming that Guzman was an agent of the Petitioner, his presence within 10 feet from the polling place did not amount to objectionable surveillance, I agree with the Hearing Officer's conclusion that, in the absence of evidence of coercion or other objectionable conduct, an agent of a union being present near a polling site is insufficient to warrant setting aside the election. Based on my review of the record, I find no such evidence of coercion or other objectionable conduct. I find this particular situation to be indistinguishable from *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enfd* 703 F.2d 876 (5th Cir. 1983), where union agents were engaged in electioneering in the parking lot approximately 10 feet from the polling place, but separated by glass doors and not designated as a "no-electioneering zone" by the Board agent conducting the election.⁴ Thus, I reject the Employer's exception.

For the reasons set forth in this Decision and the Hearing Officer's report, I agree with the Hearing Officer's recommendation to overrule these objections.⁵

III. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's Report and recommendations, the exceptions and arguments made by the Employer, and the arguments made by the Petitioner, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit described below.

⁴ The fact that the conduct did not occur in a designated "no-electioneering zone" distinguishes this case from *Nathan Katz Realty*, as well as the type of conduct involved. The Employer's counsel acknowledged at the hearing that there was no "no-electioneering zone" set by the Board agent.

⁵ Accordingly, I reject the Employer's thirteenth exception, a "catch-all" exception that the Hearing Officer's ultimate recommendations are erroneous.

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IV. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for the International Union of Painters and Allied Trades, AFL-CIO, District Council 51, and that it is the exclusive representative of all the employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by November 16, 2015. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: November 2, 2015

(SEAL)

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

THESIS PAINTING, INC.,

Employer

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Petitioner.

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Case No. 05-RC-155713

EMPLOYER'S REQUEST FOR REVIEW

Thesis Painting, Inc. ("Thesis" or "the Employer"), by its attorneys, hereby submits its Request for Review of the Regional Director's Decision and Certification of Representative in the above referenced matter, pursuant to Sections 102.67 and 102.69 of the Board's Rules and Regulations.¹ The Regional Director held that the Employer's Objections should be overruled in their entirety, notwithstanding clear evidence of unlawful electioneering and surveillance during the election by union agents that should have required the election to be set aside under *Milchem, Inc.*, 170 NLRB 362 (1968), and/or *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), and related cases. Review should be granted under the criteria set forth in Section 102.67 because the Regional Director's departure from Board precedent raises a "substantial question of law or policy" and because the Regional Director made "clearly erroneous findings" on "substantial factual issues."

¹ The Record on Review is attached as an Appendix to this Request.

I. The Regional Director Clearly Erred In Failing To Find Adan Guzman And/Or Jose Raymundo Were Agents Of The Union.

As will be discussed in greater detail below, the record evidence establishes that two non-employees, Adan Guzman and Jose Raymundo, engaged in improper electioneering and surveillance during the election within 10 feet of the polling area, where employees were waiting in line to vote, and even inside the polling area. The first substantial factual (and legal) question presented by this case is whether these non-employees were agents of the Union. The Regional Director clearly erred in failing to so find. (RD Dec. at 5-6).

As to Guzman's agency status, employee Nelson Caceres credibly testified that Guzman visited the home of another employee, Jose Viera, to solicit an authorization card on behalf of the Union. (Tr. 14-16, 21, 30-31). Viera reported that Guzman showed him his paycheck from the unionized employer where he worked. (Tr. 15). Employee Jose Carranza Arias further testified that Guzman was known to "work for the union." (Tr. 41-42). Guzman in his testimony admitted telling Viera he made more money at the unionized company in order to "help the union." (Tr. 60-61). But he denied working for the union and denied making any pre-election visits to Thesis employees at the behest of the union. (Tr. 57-61). Guzman was contradicted in his claim to have acted alone, however, by the Petitioner's own marketing director (and chief organizer), Mr. Baiza, who admitted that he did enlist Guzman to accompany him ("to come help me") on a home organizing visit to Viera. (Tr.71-75). From Baiza's testimony and that of the employee witnesses, it is clear that the union clothed Guzman with apparent authority to speak on its behalf and that he did so.

The Regional Director incorrectly characterized the evidence as showing only that Baiza "called Guzman prior to the election because Guzman knows the employees" and that Baiza "only wanted Guzman's help in getting employees to open the door and listen to him" (Baiza).

(RD Dec. at 5). To the contrary, Guzman did more than just get employees to open the door; he spoke to the employees on the union's behalf about how they could make more money working for a unionized contractor. (Tr. 60-61). Guzman engaged in such activity in the union marketing director's presence, at the union's behest, and was thereby clearly clothed with apparent authority to speak for the union. The Regional Director further erred in claiming that the union failed to "hold Guzman out" in an organizing role. (RD Dec. at 5). That is exactly what happened and that is how Guzman was perceived by employees Caceres and Viera – as a union organizer speaking at the behest of the union and on the union's behalf. Again, union marketing director Baiza plainly brought Guzman to visit Viera for the purpose of having Guzman tell the latter *on the union's behalf* that Viera would make more money working for the union. Baiza manifested by his joint presence with Guzman that Guzman was an agent of the Union speaking on the union's behalf. The credited testimony thus established that the union manifested to at least one employee (who told other employees in the small voting unit) that Guzman had apparent authority to speak on the union's behalf. The Regional Director's finding on this critical issue was factually clearly erroneous.

Because of the foregoing erroneous factual findings, the Regional Director erred on a substantial question of law or policy in failing to find Guzman to be the union's agent. The Board has observed that agency principles must be expansively construed, including when questions of union responsibility are presented. *Pratt Towers, Inc.*, 338 NLRB No. 8, slip op. at 12 (2002), citing among other cases *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993). In the latter case, the Board explained that under the Taft-Hartley Amendments to the Act, the common law of agency applies equally to employers and unions alike.² As the

² "Courts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented." *Id.* at 415.

Board in *Pratt Towers* further explained: “[C]ommon law principles of agency incorporate principles of implied and apparent authority,” which is created “through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.” *Id.* at 12.

Thus, whether the specific acts performed were authorized or subsequently ratified by the Union is not controlling; rather, if there is apparent authority or a reasonable basis for the belief that the union has authorized the alleged agent to perform the acts in question, then agency principles impute responsibility to the union. *Bellagio LLC*, 359 NLRB No. 128 (2013) (apparent authority found); *Bloomfield Health Care Center*, 352 NLRB 256 (2008); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984) (apparent authority found where the union allowed pro-union employee to speak on its behalf); *see also NLRB v. L&J Equip. Co., Inc.*, 745 F.2d 224, 233 (3rd Cir. 1984) (holding that agency relationship exists between an employee and a union if “the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on behalf of the union”); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983) (an individual can be held to be a union agent if the union instigated, authorized, solicited, ratified, condoned, or adopted the individual's actions or statements or clothed the individual with apparent authority to act on behalf of the union).

The Regional Director distinguished some of the foregoing cases on their individual facts, but failed to address the agency *standard* described by the Board in these cases as a matter of policy and law. (RD Dec. at 5). In particular, the Regional Director failed to apply correctly the basic agency principle of apparent authority, *i.e.*, whether there was a reasonable basis for Thesis employees to believe that the union authorized Guzman to speak on the union’s behalf by enlisting him in its home visits, where he was accompanied by the chief union organizer. Based on the union’s own admission to having enlisted

Guzman to make a joint organizing presentation to a Thesis employee at his home, where Guzman spoke on the union's behalf, the agency standard of apparent authority was clearly met and the Regional Director clearly erred in failing to so find.

The Regional Director also erred in relying on the assertion that "pro-union individuals do not constitute union agents merely on the basis of their vocal and active union support." (RD Dec. at 6, citing the Board's holding in *Cornell Forge Co.*, 339 NLRB 733 (2003)). First, in purporting to state the holding of *Cornell Forge* above, it must be observed that the Regional Director improperly changed the key word "employees" in the Board's holding to "individuals." Compare RD Dec. at 6 with 339 NLRB at 733. The actual holding of the case is in fact limited to "prounion employees." *Id.* The difference is quite significant in the present case because it is undisputed that Mr. Guzman was *not* an employee when he made the home visit together with the chief union organizer and spoke on the union's behalf. Guzman was also not an employee when he engaged in unlawful electioneering and surveillance at the polls when the election took place.

In any event, unlike the pro-union employees so described in *Cornell Forge Co.*, 339 NLRB 733 (2003), Guzman's agency status here is not based merely on the basis of his support for the union, but on the fact that Guzman was held out by the union marketing director as having authority to speak for the union on the subject of organizing in a joint home visit. It is this apparent authority that makes Guzman an agent, not merely his support for the union as an employee (which he was not). See also *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976), in which the appeals court found apparent authority and held volunteer members of an in-plant organizing committee to be union agents whose misconduct vitiated the results of an election; see also *Ky. Tenn. Clay Co. v. NLRB*, 295 F.3d 436, 444 (4th Cir. 2002); *NLRB v. Urban Telephone*, 499 F.2d 239, 241 (7th Cir. 1974). The same principles compel a finding of agency here.

For similar reasons, the Regional Director erred in failing to find that non-employee Raymundo was also a union agent. (RD Dec. at 6). Again, Raymundo was no longer employed by the Employer, and he had no legitimate reason to be at the election except that the Union designated him as its observer and thereby vested him with apparent authority to act on its behalf. *Detroit East, Inc.*, 349 NLRB 935, 936 (2007) (“It is well settled that election observers act as agents of the parties that they represent at the election.”). Like Guzman, Raymundo also wore a black shirt communicating a pro-union message and identifying him as one of the union’s agents. Though he took the shirt off at the request of the Board agent, this did not occur until after he was seen wearing it by employees lined up to vote. Raymundo’s role as a non-employee observer on behalf of the Union in and of itself gave him apparent authority to act on the Union’s behalf. The Regional Director failed to address Raymundo’s non-employee status with the Employer or his agency role as the Union’s observer, and again clearly erred in failing to find that he was a union agent at the time of the election.

II. As Agents Of The Union, Both Guzman And Raymundo Clearly Engaged In Electioneering Activity That Violated The *Milchem* Rule, Requiring The Election To Be Set Aside.

Once it is recognized that either Guzman or Raymundo, or both, acted as union agents on election day, it is plain that the *Milchem* rule was violated in this case, and the Regional Director’s holding to the contrary is again clear error on a substantial matter of law and policy. Both Caceres and Carazzo credibly testified that Guzman, who admitted that he had previously resigned his employment and therefore had no justification for being present at the election, nevertheless showed up at the polling area and spent a full hour standing at the front entrance to the Employer’s office, approximately 10 feet from the conference room where the ballot box was located, together with and talking to employees who were waiting in line to vote. (Tr. 14-16). It

is undisputed that all the voters had to pass by Guzman in order to enter the polling area. (*Id.*). He was wearing a black union T-shirt and was separated from the polling area itself only by a glass door through which he was fully visible throughout the hour standing with and talking to employees who were lined up and entering to vote. (*Id.*).

At one point, Guzman himself entered the polling area to cast a (properly) challenged ballot, though he was clearly not eligible to vote, and during the voting process he was seen by Cacares talking to voters in a circus-like atmosphere so crowded and noisy that the Board agent was forced to call for the employees to quiet down. (Tr. 24). Employee Jose Viera reported to Caceres that Guzman was asking him and other employees why they were not returning his phone calls regarding the union, which was itself coercive. (Tr. 15, 23, 29).³

Based on these facts, the Regional Director should have found that union agent Guzman engaged in unlawful electioneering in direct proximity to the polls that required the election to be set aside. The Board has held that “conversation[s] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.” *Milchem* 170 NLRB 362 (1968). *See also Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982) *enfd.*, 703 F. 2d 876 (5th Cir. 1983); *Nathan Katz Realty, LLC v. NLRB*, 251 F. 3d 981, 991-93 (D.C. Cir. 2001). Thus, Guzman’s conversation with Jose Viera within 10 feet of the polling area, while the employees were waiting in line to vote, in and of itself, compels setting aside the election, regardless of what Guzman said. Indeed, the presence of this non-employee union agent in the voting area wearing a union T-shirt constituted

³ The Regional Director made a clear error of fact in upholding the Hearing Officer’s finding that Guzman only stood in proximity to the polls for “only three to four minutes.” (RD Dec. at 6-7). To the contrary, employee Nelson Caceres plainly testified that Guzman and another unidentified union agent were present “almost the whole time of the voting at the glass door within 10 feet of the polls.” (Tr. 16). The “three to four minutes” to which the Regional Director refers was only the time spent by Guzman actually voting and standing inside the office area immediately adjacent to the conference room where the voting took place. (Tr. 24).

impermissible electioneering under the *Milchem* rule. The Regional Director failed properly to apply the *Milchem* rule's strict laboratory conditions approach to electioneering by union agents. *See also Star Expansion*, 170 NLRB at 364-65; *Claussen Baking*, 134 NLRB 111, 112 (1961); *Detroit Creamery Co.*, 60 NLRB 178, 179-80 (1945).

Contrary to the Regional Director's Decision (at 7), the Board's ruling in *Boston Insulated Wire & Cable Co.*, *supra*, 259 NLRB at 1118, does not excuse the misconduct here. In the *Boston* case, there was no testimony that the union electioneering occurred while employees were waiting in line or that the union agents themselves entered the polling area. In fact, the Board made a point of finding that neither of those facts occurred in the *Boston* case, whereas both elements are present here. It is also significant that the employer in the *Boston* case expressly disclaimed any reliance on a strict application of the *Milchem* rule. *See* 259 NLRB 1118, at n.6. There has been no such disclaimer in the present case. Finally, the present case involved a much smaller voting unit than in *Boston Insulated*, meaning that employees were more likely to be intimidated by the presence of multiple union agents, both inside and in close proximity to the polls.⁴

Even if it were appropriate to consider other factors referred to by the Board in *Boston Insulated*, 259 NLRB at 1119, those factors support setting aside the election here. The electioneering here, unlike in *Boston*, was conducted by union agents both inside, adjacent to and extremely close to the voting area and was directed at employees waiting in line to vote. Also unlike *Boston*, the voters were not insulated from the union agents' activity because two of the

⁴ There was also a third union agent present at the vote whose name was not known to Mr. Caceres, and whose actions were ignored by the Regional Director. In combination with the two known agents, the third man contributed to the improper electioneering that required the election to be set aside, particularly in light of the small size of the bargaining unit. The unknown non-employee agent was testified about by Caceres and complained about by another employee named Salvador on the day of the election. (Tr. 28-31).

agents *entered the voting area itself*, one to act as a non-employee observer for the union, and the other for the illegitimate purpose of casting a ballot as a non-employee. No similar activity occurred in *Boston Insulated*, and the Regional Director clearly erred in claiming the facts of that case were “indistinguishable.”

For similar reasons, the Hearing Officer erred by failing to find that Guzman engaged in improper surveillance by stationing himself at the front entrance to the polling area in such a way that all the voters had to pass by him in order to cast their ballots. *See Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001); *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1982); *Performance Measurements Co.*, 148 NLRB 1657, 1659, sup. By 149 NLRB 1451 (1964). In *Performance Measurements*, the Board held that the continued presence of the Employer’s president at a location where employees were required to pass in order to enter the polling place was improper conduct, even though no electioneering occurred. Likewise in *Electric Hose*, a supervisor stood at a section of a plant where employees had to pass in order to reach a voting area, and again the Board held that such conduct without more, constituted unlawful conduct during an election. Based on these precedents, the D.C. Circuit in *Nathan Katz Realty* held that union agents engaged in objectionable conduct when they sat in their car outside a church where voting was being held, such that employees had to pass under the agents’ surveillance in order to reach the polls, even though the union agents engaged in no electioneering. For the same reasons, union agent Guzman engaged in unlawful surveillance in the present case and the election must be set aside.⁵

⁵ Contrary to the Regional Director’s Decision, at 7, n.4, *Nathan Katz* is not distinguishable based on the existence of a no electioneering area in that case. The court did not base its decision on the no electioneering area, but on the fact that the union agents, who sat in their car at a significantly greater distance than occurred here, were positioned in a place where employees had to pass in order to vote. 251 F.3d at 991-3.

Similarly, the Regional Director erroneously found that union observer and agent Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt. (RD Dec. 6-7). To the contrary, the credited testimony established that union observer Raymundo, another non-employee who was not eligible to vote in the election, wore a black union shirt into the voting area until asked by the Board agent to remove it. Still wearing the union shirt, Raymundo then walked by the large group of employees waiting to vote (constituting almost half of the unit), and in this manner communicated his pro-union message to the employees within 10 feet of the voting area prior to changing his shirt and returning to act as the union's observer. This constituted prohibited electioneering inside and in proximity to the polls that required the election to be set aside.

Conclusion

Wherefore, for the reasons set forth above, the Board should grant review and set aside the Regional Director's Decision certifying the results of the election. The election itself should be set aside.

Respectfully submitted,

/s/ Maurice Baskin

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Attorney for the Employer

November 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Request for Review and Appendix containing the record on review have been served by electronic mail and/or first class mail on the following this 16th day of November, 2015:

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/s/Maurice Baskin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THESIS PAINTING, INC.
Employer

and

Case 05-RC-155713

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Certification of Representative is denied, as it raises no substantial issues warranting review.¹

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., March 24, 2016

¹ In denying review, we agree with the Regional Director's finding that Adan Guzman was not an agent of the Petitioner, and therefore that his conduct during the election was not objectionable under Milchem, Inc., 170 NLRB 362 (1968). We need not pass on the Regional Director's alternate finding that, even if Guzman were an agent, his conduct would not have violated Milchem. In addition, although Jose Raymundo may have been the Petitioner's limited agent during the election while he served as the Petitioner's observer, see Dubovsky & Sons, Inc., 324 NLRB 1068 (1997), his wearing of a union t-shirt before the election started was not objectionable. See also Larkwood Farms, 178 NLRB 226 (1969)(an observer's mere wearing of campaign insignia is not objectionable).

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

| DO NOT WRITE IN THIS SPACE | |
|----------------------------|------------|
| Case | Date Filed |
| 05-CA-172905 | 3/30/16 |

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

| 1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT | | |
|---|--|---|
| a. Name of Employer Thesis Painting, Inc. | | b. Tel. No. (703) 440-5900 |
| | | c. Cell No. |
| d. Address (street, city, state ZIP code) 7401-D Fullerton Road Springfield, Virginia 22153 | e. Employer Representative Barbara Spyridakis | f. Fax No. (703) 440-5929 |
| | | g. e-Mail |
| | | h. Dispute Location (City and State) Springfield, VA |
| i. Type of Establishment (factory, nursing home, hotel) Construction | j. Principal Product or Service Painting | k. Number of workers at dispute location 40 |
| l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act. | | |
| 2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since about November 2, 2015, the Employer has failed and refused to bargain collectively and in good faith with the International Union of Painters and Allied Trades, District Council 51, AFL-CIO, by refusing to meet with employees' certified bargaining representative. | | |
| 3. Full name of party filing charge (if labor organization, give full name, including local name and number) International Union of Painters and Allied Trades, AFL-CIO, District Council 51 | | |
| 4a. Address (street and number, city, state, and ZIP code) 4700 Boston Way Lanham, Maryland 20706 | | 4b. Tel. No. |
| | | 4c. Cell No. 202-716-6297 |
| | | 4d. Fax No. |
| | | 4e. e-Mail Sperez63@verizon.net |
| 5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Union of Painters and Allied Trades, AFL-CIO | | |
| 6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief. | | Tel. No. |
| By:  Sandro Baiza Marketing Representative | | Office, if any, Cell No. 202-716-6297 |
| | | Fax No. |
| Address: 4700 Boston Way Lanham, Maryland 20706 | | e-Mail 202-716-6297 |
| Date: 3-30-16 | | |

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THESIS PAINTING, INC.

and

Case 5-CA-172905

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Thesis Painting, Inc. (Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by the Union on March 30, 2016, and a copy was served on Respondent by U.S. mail on March 31, 2016.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Springfield, Virginia, Respondent's facility, and has been engaged in the business of providing commercial painting services.

(b) In conducting its operations during the 12-month period ending March 31, 2016, a representative period, Respondent performed services valued in excess of \$50,000 in states other than the State of Virginia.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

| | | |
|--------------------------|---|---------------------|
| Angelo Spyridakis | - | Owner and President |
| Bobby Spyridakis | - | Vice-President |
| Jorge Trilla | - | Supervisor |
| Tony (last name unknown) | - | Supervisor |

5. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time painters and lead painters employed by the employer; excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

6. (a) On July 31, 2015, a representation election was conducted among the employees in the Unit and, on November 2, 2015, the Union was certified as the exclusive collective-bargaining representative of the Unit by the undersigned Regional Director of Region 5.

(b) On November 16, 2015, Respondent submitted a Request for Review of the Regional Director's Decision and Certification of Representative.

(c) On March 24, 2016, the Board denied Respondent's Request for Review of the Regional Director's Decision and Certification of Representative.

(d) At all times since March 24, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

7. About March 28, 2016, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

8. Since about March 28, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

9. By the conduct described above in paragraph 8, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

As part of the remedy for Respondent's unfair labor practices alleged above in paragraph 8, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Charging Party, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before May 12, 2016, or postmarked on or before May 11, 2016.**

Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or

if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on July 6, 2016, at 10:00 a.m., at the Board Hearing Room, Suite 6001, 1015 Half Street, SE, Washington, DC, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Baltimore, Maryland this 28th day of April 2016.

(SEAL)

/s/ CHARLES L. POSNER

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center - Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201

Attachments

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD REGION 5

THESIS PAINTING, INC.

and

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

CASE NOS. 5-CA-172905

RESPONDENT THESIS PAINTING'S ANSWER TO COMPLAINT

Respondent Thesis Painting, Inc. ("Respondent Thesis"), hereby files this Answer to the General Counsel's Complaint, as follows:

1. Without knowledge and therefore denied.
2. (a) Admitted.
(b) Admitted.
(c) Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. (a) Admitted.
(b) Admitted.
(c) Admitted.
(d) Denied.

7. Admitted that the Union requested bargaining. Denied that the Union has been properly certified as the exclusive collective-bargaining representative of the Unit.
8. Admitted that Respondent has refused to recognize and bargain with the Union. Denied that the Union has been properly certified as the exclusive collective-bargaining representative of the Unit.
9. Denied.
10. Denied.

Respondent Thesis denies that the General Counsel and/or the Charging Party are entitled to any of the requested remedies.

AFFIRMATIVE DEFENSES

1. The Complaint is not substantially justified within the meaning of the Equal Access to Justice Act (EAJA).
2. The Complaint is largely redundant with and closely related to the Amended Complaint filed against the Respondent in Case No. 5-CA-167137, including numerous allegations which Respondent has previously answered. Such piecemeal litigation of related unfair labor practices violates Respondent's right to due process and/or constitutes double jeopardy and/or abuse of the Board's processes and is barred on that basis. *See Jefferson Chemical Co.*, 200 NLRB 992 (1972) (and cases citing thereto).
3. The Board's certification of the Charging Party as the representative of the Respondent's employees, and the failure to overturn the results of the election, was invalid, arbitrary, and capricious and departed from precedent without justification, for the reasons stated in Respondent's objections to the election and Request for Review. More specifically, the Board

and Regional Director erred in failing to find that the Union, through its agents, engaged in unlawful surveillance and/or electioneering during the election, and that the individuals who engaged in such improper activity were in fact the Union's agents.

4. The Board's certification of the Charging Party as the representative of the Respondent's employees was also invalid because the election was conducted pursuant to rule changes that were contrary to the Act and arbitrary and capricious in violation of the Administrative Procedure Act, for reasons more fully set forth in the briefs of Appellants in the pending case of *Associated Builders and Contractors v. NLRB*, 15-50497 (5th Cir. appeal pending).

Wherefore, Respondent Thesis is entitled to an Order dismissing the Complaint with prejudice, and/or judgment in its favor, together with an award of attorneys' fees in such amounts as are authorized by the EAJA.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

Attorney for Respondent Thesis

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer to Complaint were served on the following by email and U.S. mail this 17th day of May, 2016:

Mr. Sandro Baiza
International Union of Painters & Allied
Trades, Dist. Council 51, AFL-CIO
4700 Boston Way
Lanham, MD 20706-4311
Charging Party

Charles Posner, Regional Director
NLRB, Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201

/s/ Maurice Baskin_____

Maurice Baskin

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THEISIS PAINTING, INC.

and

Case 05-CA-172905

**INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51**

**MOTION TO TRANSFER CASE TO THE BOARD
AND FOR SUMMARY JUDGMENT**

Pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations and Statement of Standard Procedure, Series 8, as amended, herein called the Rules, counsel for the General Counsel respectfully moves that the National Labor Relations Board, herein called the Board: (1) transfer this case and continue the proceedings before the Board; (2) deem the allegations set forth in the Complaint and Notice of Hearing issued on April 28, 2016, as admitted to be true without the taking of evidence supporting the allegations in the Complaint and Notice of Hearing; and (3) grant summary judgment and issue a Decision and Order herein on the basis of the following:

1. On July 9, 2015, the International Union of Painters and Allied Trades, AFL-CIO, District Council 51, herein called the Union, filed a Petition in Case 05-RC-155713, seeking to represent a Unit consisting of all full time and regular part time painters employed by Thesis Painting, herein called Respondent. See Exhibit 1.
2. On July 31, 2015, a representation election was conducted among the employees in the Unit.

3. On August 3, 2015, the parties were served with a Tally of Ballots showing that, of approximately 32 eligible voters, 21 votes were cast for the Union, 11 votes were cast against the Union, and there were 5 challenged ballots that were not determinative. See Exhibit 2.

4. On August 7, 2015, the Respondent filed Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election. See Exhibit 3.

5. A hearing on the Respondent's objections was held on August 21, 2015.

6. On November 2, 2015, the Regional Director for Region Five issued a Decision and Certification of Representative, overruling Respondent's objections and certifying the Union as the exclusive collective-bargaining representative of following unit: All full-time and regular part-time painters and lead painters employed by the employer, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act. See Exhibit 4.

7. By letter dated November 5, 2015, the Union requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit. See Exhibit 5.

8. Respondent failed to respond to the Union's letter dated November 5, 2016, or to bargain collectively with the Union.

9. On November 16, 2015, Respondent submitted a Request for Review of the Regional Director's Decision and Certification of Representative. See Exhibit 6.

10. On March 24, 2016, the Board denied Respondent's Request for Review of the Regional Director's Decision and Certification of Representative, finding it raised no substantial issues warranting review. See Exhibit 7.

11. By letter dated March 28, 2016, the Union again requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit. See Exhibit 8.

12. Since about March 28, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

13. On March 30, 2016, the Union filed a charge in Case 05-CA-172905, alleging that Respondent violated Section 8(a)(1) and (5) of the Act. See Exhibit 9. The charge was served on Respondent by regular mail on March 31, 2016. See Exhibit 10.

14. On April 28, 2016, the Regional Director for Region Five issued a Complaint and Notice of Hearing alleging, in pertinent part, that since on or about March 28, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit for which the Union is certified. See Exhibit 11. The Complaint and Notice of Hearing was served on Respondent on April 28, 2016. See Exhibit 12.

15. On May 17, 2016, Respondent filed an Answer to the Complaint, in which it admitted the following: (a) Respondent is a corporation with an office and place of business in Springfield, Virginia, Respondent's facility, and has been engaged in the business of providing commercial painting services; (b) in conducting its operations during the 12-month period ending March 31, 2016, Respondent performed services valued in excess of \$50,000 in States other than the State of Virginia; (c) at all material times, it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act; (d) at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act; (e) at all material times, Angelo Spyridakis has held the position of Respondent's Owner and President, and has been a supervisor and agent of Respondent within the meaning of Sections 2(11) and (13) of the Act; (f)

at all material times, Bobby Spyridakis has held the position of Respondent's Vice-President, and has been a supervisor and agent of Respondent within the meaning of Sections 2(11) and (13) of the Act; (g) at all material times, Jorge Trilla has held the position of Respondent's Supervisor, and has been a supervisor and agent of Respondent within the meaning of Sections 2(11) and (13) of the Act; (h) at all material times, Tony (last name unknown) has held the position of Respondent's Supervisor, and has been a supervisor and agent of Respondent within the meaning of Sections 2(11) and (13) of the Act; (i) the following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time painters and lead painters employed by the employer, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act; (j) on July 31, 2015, a representation election was conducted among the employees in the Unit, and on November 2, 2015, the Union was certified as the exclusive collective-bargaining representative of the Unit; (k) on November 16, 2015, Respondent submitted a Request for Review of the Regional Director's Decision and Certification of Representative; (l) on March 24, 2016, the Board denied Respondent's Request for Review of the Regional Director's Decision and Certification of Representative; (m) about March 28, 2016, the Charging Party, by letter, requested that Respondent bargain collectively with the Charging Party; and (n) since about March 28, 2016, Respondent has failed and refused to recognize and bargain with the Charging Party. See Exhibit 13.

16. Respondent's Answer fails to raise any genuine issues of material fact, as Respondent admits it has failed and refused to recognize and bargain with the Union as the exclusive, collective-bargaining representative of the Unit.

17. Respondent's first affirmative defense alleges that the Complaint is not substantially justified within the meaning of the Equal Access to Justice Act (EAJA). Since Respondent admitted to its refusal to bargain with the certified representative of the Unit, no genuine issues of material fact exist regarding Counsel for the General Counsel's substantial justification for issuing the Complaint. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Laborers Funds Admin. Office of N. California, Inc.*, 302 NLRB 1031 (1991). Counsel for the General Counsel therefore requests that the Board, after transferring this proceeding to itself, strike Respondent's first defense, or in the alternative, disregard this defense.

18. Respondent's second affirmative defense alleges that, pursuant to *Jefferson Chemical Co.*, 200 NLRB 992 (1972) (and cases citing thereto), litigation of the allegations in the instant charge should be barred, as the allegations are redundant with and closely related to the Amended Complaint filed against Respondent in Case 05-CA-167137. Contrary to Respondent's claim, the conduct at issue in Case 05-CA-167137 (Respondent's unilateral layoff of employees since about August 7, 2015) represents a separate and distinct violation of the Act than that alleged in the instant case (a test of the certification arising out of Case 05-RC-155713). Since the General Counsel is not attempting to twice litigate the same conduct as a violation of different sections of the Act or to relitigate the same charge in different cases, the decision to separately litigate the allegations in the instant Complaint is within the discretion of the General Counsel. *U-Haul Co. of Nevada*, 345 NLRB 1301 (2005). As such, counsel for the General Counsel requests that the Board, after transferring this proceeding to itself, strike Respondent's second defense, or in the alternative, disregard this defense.

19. Respondent's third and fourth affirmative defenses allege issues already presented by Respondent in the representation proceedings in Case 05-RC-155713. Where, as here, a party

fails to meet and bargain following certification by the Board, it is the Board's policy that absent newly discovered or previously unavailable evidence or special circumstances, the party is not allowed to relitigate, in a proceeding alleging unfair labor practices, issues that were, or could have been, litigated in a prior representation proceeding. *Westinghouse Broadcasting Co., Inc.*, 218 NLRB 693, 694 (1975); *Keco Industries, Inc.*, 191 NLRB 257, 258 (1971). Here, Respondent does not argue that there is newly discovered or previously unavailable evidence or special circumstances. Counsel for the General Counsel therefore requests that the Board, after transferring this proceeding to itself, strike Respondent's third and fourth defenses, or in the alternative, disregard these defenses.

20. Because no genuine issue of material fact exists in this case and Respondent has not shown that newly discovered, relevant evidence is now available, the Board should transfer this case and continue the proceedings before it; deem the allegations set forth in the Complaint to be true without receiving evidence; grant summary judgment; and issue a Decision and Order. It is respectfully requested that the Board make its findings of fact based on the allegations in the Complaint and conclude that, as a matter of law, Respondent has violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint and order an appropriate remedy, including an order that the initial certification year shall be deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified collective-bargaining representative of the employees in the appropriate unit. *Campbell Soup Co.*, 224 NLRB 13, 15 (1976).

Dated at Baltimore, Maryland, this 24th day of May, 2016.

Respectfully Submitted,

/s/ Andrea J. Vaughn
Andrea J. Vaughn
Counsel for General Counsel
National Labor Relations Board, Region 5

Bank of America Center – Tower II
100 South Charles Street
Suite 600
Baltimore, Maryland 21201
Telephone: (410) 962-0676
Facsimile: (410) 962-2198
Email: andrea.vaughn@nrlb.gov

CERTIFICATE OF SERVICE

This is to certify that on May 24, 2016, copies of the General Counsel's Motion to Transfer Case to the Board and for Summary Judgment were served by e-mail and U.S. mail to:

Maury Baskin, Esq.
Littler, Mendelson, P.C.
815 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20006
MBaskin@littler.com

Sandro Baiza
International Union of Painters and Allied Trades, AFL-CIO
4700 Boston Way
Lanham, MD 20706
sbaiza@verizon.net

/s/ Andrea Vaughn
Counsel for General Counsel
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles Street
Suite 600
Baltimore, Maryland 21201
Telephone: (410) 962-0676
Facsimile: (410) 962-2198
Email: andrea.vaughn@nrlrb.gov

APPENDIX: LIST OF EXHIBITS

| | |
|------------|---|
| Exhibit 1 | Petition filed July 9, 2015 |
| Exhibit 2 | Tally of Ballots |
| Exhibit 3 | Respondent's Objections to Conduct of the Election |
| Exhibit 4 | Region Five Decision and Certification of Representative |
| Exhibit 5 | November 5, 2016 Union letter to Respondent requesting bargaining |
| Exhibit 6 | Respondent's Request for Review |
| Exhibit 7 | Board Order denying Respondent's Request for Review |
| Exhibit 8 | March 28, 2016 Union letter to Respondent requesting bargaining |
| Exhibit 9 | Charge filed March 30, 2016 |
| Exhibit 10 | Service of Charge on March 31, 2016 |
| Exhibit 11 | Complaint and Notice of Hearing |
| Exhibit 12 | Service of Complaint and Notice of Hearing |
| Exhibit 13 | Respondent's Answer to Complaint and Notice of Hearing |

Exhibit 1

FORM NLRB-502 (RC)
(4-15)UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

5-AC-155713

Date Filed

7/9/15

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer

Thesis Painting, Inc.

2b. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code)

7401-D Fullerton Road, Springfield, VA 22153

3a. Employer Representative - Name and Title

Barbara Spyridakis, Owner

3b. Address (If same as 2b - state same)

SAME AS ABOVE

3c. Tel. No.

703-440-5900

3d. Cell No.

3e. Fax No.

703-440-5929

3f. E-Mail Address

Barbara@ThesisPainting.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)

Painting contractor

4b. Principal product or service

Painting services

5a. City and State where unit is located:

Springfield, VA

6b. Description of Unit Involved

Included: All full-time and regular part-time painters employed by the Employer.

Excluded: All estimators, office-clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

6a. No. of Employees in Unit:

40

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☒ No ☐

Check One: ☒ 7a. Request for recognition as Bargaining Representative was made on (Date) 07-09-2015 and Employer declined recognition on or about No reply (Date) (If no reply received, so state).

☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel. No.

8d. Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

None

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11b. Election Date(s):

July 29, 2015

11c. Election Time(s):

11a. Election Type: Manual ☒ Mail ☐ Mixed Manual/Mail ☐

11d. Election Location(s):

12a. Full Name of Petitioner (including local name and number)

International Union of Painters and Allied Trades, AFL-CIO, District Council 51

12b. Address (street and number, city, state, and ZIP code)

4700 Boston Way, Lanham, MD 20706

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (If none, so state)

International Union of Painters and Allied Trades, AFL-CIO

12d. Tel. No.

301-918-0182 ext. 117

12e. Cell No.

240-508-9834

12f. Fax No.

301-918-3177

12g. E-Mail Address

SBAiza@Verizon.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title

Sandro Baiza, Marketing Representative

13b. Address (street and number, city, state, and ZIP code)

SAME AS ABOVE

13c. Tel. No.

SAME AS ABOVE

13d. Cell No.

SAME AS ABOVE

13e. Fax No.

SAME AS ABOVE

13f. E-Mail Address

SAME AS ABOVE

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)

Sandro Baiza

Signature

Title

Marketing Representative

Date

07-09-2015

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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Exhibit 2

FORM NLRB-760
(7-10)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed

Jul 9, 2015

THESIS PAINTING INC.,
Employer
and
INTERNATIONAL UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO, DISTRICT COUNCIL 51
Petitioner

Case No. 5-RC-155713

Date Issued 07/31/2015

City Springfield

State VA

Type of Election:
(Check one:)

(If applicable check
either or both:)

- ☒ Stipulation
☐ Board Direction
☐ Consent Agreement
☐ RD Direction
Incumbent Union (Code)

- ☐ 8(b) (7)
☐ Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 32
2. Number of Void ballots 0
3. Number of Votes cast for
PETITIONER 21
4. Number of Votes cast for _____
5. Number of Votes cast for _____
6. Number of Votes cast against participating labor organization(s) 11
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 32
8. Number of challenged ballots 5
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 37
10. Challenges are (not) sufficient in number to affect the results of the election. not
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51

For the Regional Director - Region 5 [Signature]

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

Terry R. Skop

For PETITIONER

[Signature]

For _____

From: Ksander, Katrina H.
To: ["Tony Skogen"](#); ["Sandro Baiza"](#)
Subject: Thesis Painting Tally of Ballots
Date: Monday, August 03, 2015 11:46:00 AM
Attachments: [TOB.05-RC-155713.Tally of Ballots 7.31.15.pdf](#)

Please see attached Tally of Ballots from 7.31.15

Katrina H. Ksander

Senior Field Attorney

National Labor Relations Board
Region 5, Washington Resident Office
1015 Half Street, SE, Suite 6020
Washington D.C. 20570

Direct: 202-273-2962
Fax: 202-208-3013
katrina.ksander@nrlb.gov

Exhibit 3

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

In the Matter of:

THESIS PAINTING, INC.,

Employer

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Petitioner.

Case No. 05-RC-155713

**EMPLOYER'S OBJECTIONS TO THE CONDUCT OF THE ELECTION AND
TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to the Rules and Regulations of the National Labor Relations Board including section 102.69(a) thereof, Thesis Painting, Inc., the Employer in the above-captioned matter hereby files the following Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election in connection with the election conducted by Region 5 on July 31, 2015. Also filed today with these Objections is the Employer's Statement of Position and Evidence in Support of Objections to the Election.

The Employer alleges that the following conduct improperly affected the election and requires that the election be set aside and that a new election be held:

1. During the election, the Union, through its agents and/or representatives, or engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.
2. During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in

improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

Based upon each of the foregoing Objections, or in combination thereof, the Employer respectfully submits that the election must be set aside and a new election held.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin

Mark Eskenazi

Littler Mendelson, P.C.

1150 17th St., N.W.

Washington, D.C. 20036

P: 202-772-2526

F: 202-842-0011

mbaskin@littler.com

meskenazi@littler.com

Attorneys for the Employer

August 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election have been served on the following, this 7th day of August, 2015:

Sandro Baiza, Marketing Representative
International Union of Painters and Allied Trades, AFL-CIO,
District Council 51
4700 Boston Way
Lanham, MD 20706

/s/ Maurice Baskin

Exhibit 4

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THESIS PAINTING, INC.

Employer

and

Case 05-RC-155713

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

Petitioner

**DECISION AND
CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Stipulated Election Agreement, an election was conducted on July 31, 2015 in a unit of Thesis Painting, Inc.'s (the Employer) full-time and regular part-time painters and lead painters, excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act. The tally of ballots showed that of the approximately 32 eligible voters, 21 cast ballots for the International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (the Petitioner), and 11 cast ballots against representation. There were 5 challenged ballots, a number insufficient to affect the results of the election. Therefore, the Petitioner received a majority of the votes.

The Employer timely filed two objections. On August 12, 2015,¹ I ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. On August 21, the Hearing Officer designated to conduct the hearing heard testimony and received into evidence relevant documents. The parties were not permitted to file briefs, but were allowed to provide oral arguments prior to the close of the hearing. Subsequently, on September 22, the Hearing Officer issued a report in which he recommended overruling the objections in their entirety.

On October 6, the Employer filed 13 exceptions to the Hearing Officer's recommendations. In its exceptions, the Employer contends that the Hearing Officer erred in:

(1) incorrectly applying a strong presumption in favor of upholding an election that does not apply under the circumstances of this case, where the objection is based upon *Milchem, Inc.*, 170 NLRB 362 (1968);

(2) improperly applying an "objective" test for finding coercion of employees during an election, and/or a 9-part test for unlawful interference;

¹ Unless otherwise noted, all subsequent dates are 2015.

Thesis Painting, Inc.
Case 05-RC-155713

November 2, 2015

(3) failing to acknowledge that two former employees, Adan Guzman and Jose Raymundo, admitted to resigning from their employment prior to the election;

(4) failing to acknowledge that employee Nelson Caceres was told by a co-worker that Caceres asked him why he had not returned his calls;²

(5) erroneously finding that “at no time. . . did any known agents of the Petition[er] manifest to [employee Jose] Viera or any other third party that Guzman was speaking on behalf of the Petitioner,”;

(6) erroneously finding that the Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt;

(7) erroneously finding that “employees would not have reasonably believed that Guzman and Raymundo were speaking on behalf of the Petitioner at any time” and failing to find that former employees Guzman and Raymundo were both agents of the union based upon apparent authority;

(8) erroneously failing to apply either the no-conversation rule of *Milchem* or the rule of *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001) prohibiting election surveillance

(9) mischaracterizing Caceres’s testimony as to how long Guzman was present within 10 feet of the polling area

(10) failing to discredit Guzman’s denial that he was wearing a union T-shirt while he stood in proximity to the polls and spoke to voters;

(11) failing to make credibility findings adverse to the Petitioner’s witnesses, particularly Guzman, and failing to draw adverse inferences from the discredited nature of Guzman’s testimony;

(12) erroneously finding that even if Guzman was an agent of the Petitioner, his stationing himself within 10 feet from the polling place and engaging in surveillance of the voters was not objectionable; and

(13) based upon all of the erroneous findings cited above, erring in recommending that the Employer’s Objection 1 and Objection 2 be overruled in their entirety.

The Petitioner filed a brief in opposition to the Employer’s exceptions on October 15.

² The Employer’s exception #4 is that “[t]he Hearing Officer failed to report that Caceres was told by a co-worker that Caceres asked him why he had not returned his calls, which the co-worker connected to Guzman’s previous home visit together with the union’s marketing director.” However, based on my review of the Employer’s supporting brief (at p. 2) and the record, it seems apparent that the Employer’s exception is that the Hearing Officer did not acknowledge the record evidence that Caceres was told by a co-worker that *Guzman*, not Caceres, asked the co-worker why the co-worker had not returned Guzman’s calls.

Thesis Painting, Inc.
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I have reviewed the record in light of the exceptions and briefs, and adopt the Hearing Officer's findings and recommendations to the extent consistent with this Decision. I find that the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTIONS

- Objection 1. During the election, the Union, through its agents and/or representatives, engaged in improper electioneering, pressure, or surveillance immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.
- Objection 2: During the election, the Union, through employees who were its agents and/or representatives, or alternatively through employees who supported the Union, engaged in improper electioneering, pressure or surveillance of voters within or immediately outside the polling area while the polls were open and while employees were waiting to vote or on their way to vote.

At root, the Employer contends that on the day of the July 31 election, former employees Adan Guzman and Jose Raymundo engaged in objectionable electioneering and surveillance during the election within ten feet of the polling area. The Employer further contends that Guzman and Raymundo are agents and/or employees of the Petitioner, and that employees would have reasonably believed Guzman and Raymundo were speaking on behalf of the Petitioner during the election period. Regarding Guzman, the Employer alleges that he wore a T-shirt with union insignia on it and stood outside of the polling area for an hour talking to employees who were lined up and entering to vote. The Employer further alleges that Guzman went to the home of at least one employee to solicit support for the Petitioner. Similarly, the Employer contends that Raymundo, who served as an observer for the Petitioner in the election, engaged in prohibited electioneering by walking by a line of employees waiting to vote while wearing a T-shirt with union insignia on it.

In its exceptions, the Employer contends that the Hearing Officer made incorrect findings of fact and applied incorrect standards of law in assessing the burdens of proving conduct that required the election to be set aside under *Milchem, Inc.* and *Nathan Katz Realty*. In particular, the Employer's core contention is that the Hearing Officer erred in failing to find that individuals who were held out as the Petitioner's agents engaged in prohibited electioneering and surveillance during the election. Thus, the Employer's argument as to why the election should be set aside hinges almost entirely on establishing the agency of either of two individuals.

II. ANALYSIS

Based upon my review of the record and the Employer's exceptions and supporting briefs, I conclude that the Employer did not meet its burden of proving that Guzman and Raymundo are agents of the Petitioner. I further find that the record supports a conclusion that neither engaged in improper electioneering, coercion, nor surveillance.

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As the Hearing Officer correctly noted, “there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). The Employer is correct to note that in *Milchem*, supra, the Board promulgated a strict rule that a party to an election engages in objectionable conduct when one of its supervisors or agents engages in sustained conversations with employees who are waiting to cast ballots. The Board held “that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations.” *Milchem*, supra at 362. However, the Employer’s first exception is misplaced. In my view, rather than the selection of the incorrect legal standard, all the Hearing Officer described in that portion of his report were more generalized legal principles of the burdens and standards for setting aside an election conducted by the Board. The Hearing Officer was clearly cognizant of *Milchem*, as he later described its rule and why he found it to be inapplicable based on his conclusions that the Employer did not meet its burden of establishing that either Guzman or Raymundo are agents of the Petitioner.

Generally, the Board applies an objective test in evaluating a party’s conduct during the critical period surrounding an election, i.e., whether the conduct has “the tendency to interfere with the employees’ freedom of choice.” *Cedars-Sinai Medical Center*, 342 NLRB 596, 602 (2004) (quoting *Cambridge Tool Mfg.*, 316 NLRB 716 (1995)). In doing so, the Board considers the nine factors correctly identified by the Hearing Officer. Accordingly, I reject the Employer’s second exception to the Hearing Officer’s mere articulation of the nine-part test for evaluating whether a party’s conduct reasonably tended to interfere with employees’ free choice in the election. While the Employer alleges the objective test is irrelevant to the question of whether the *Milchem* rule was violated, it is quite clear that the Hearing Officer was not applying the rules of *Milchem* or *Nathan Katz Realty* because the Hearing Officer determined that a standard for evaluating the conduct of a party to the election was not applicable.

The Employer’s next two exceptions concern the Hearing Officer’s treatment of record evidence. For its third exception, the Employer essentially argues that the Hearing Officer omitted to mention that both Guzman and Raymundo were no longer employed by the Employer at the time of the election. I disagree, as the Hearing Officer clearly described how both Guzman and Raymundo were previously employed by the Employer, but not on the date of the election. As for its fourth exception regarding the Hearing Officer’s failure to include hearsay evidence in his factual narrative, I note that while hearsay may be received into evidence at a representation case hearing at the discretion of the hearing officer, the Board has given hearsay lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (describing that administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). Here, Caceres testified that his co-worker told Caceres that Guzman had visited the co-worker’s home before the election. Caceres further testified that he heard that Guzman was asking employees why they had not returned his calls. On this record, I conclude that it was not an error for the Hearing Officer to not include the hearsay evidence in his factual narrative. As the Hearing Officer’s

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Report suggests, he did not include the entirety of evidence, but omitted to discuss certain evidence that he found to be irrelevant, cumulative, or otherwise of little probative value.

The Employer's fifth, sixth, and seventh exceptions revolve around the Hearing Officer's finding that the Employer failed to meet its burden of establishing the agency of either Guzman or Raymundo. As the Hearing Officer correctly noted previously in his report, the burden of proving an agency relationship is on the party asserting its existence. *Cornell Forge Co.*, 339 NLRB 733 (2003) (citing *Millard Processing Services*, 304 NLRB 770, 771 (1991) (citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948)). In evaluating whether an individual is an agent of a union, the Board applies common law principles. Accordingly, a party asserting agency status may meet its burden of proof by establishing that the alleged agent held apparent authority, such as by evidence that the principal created a reasonable basis for a third party to believe that the alleged agent is authorized to act on behalf of the principal.

Regarding Guzman, the Hearing Officer explicitly relied on the testimony about Guzman making a single house call to employee Jose Viera, where Guzman showed Viera a copy of a paycheck Guzman earned while working for a another employer. The Employer alleges that the Petitioner's marketing director, Sandro Baiza, plainly brought Guzman to visit Viera for the purpose of informing Viera that he would make more money working for a unionized employer. Baiza testified that he called Guzman prior to the election because Guzman knows the employees. Furthermore, Baiza testified that he only wanted Guzman's help in getting employees to open the door and listen to him because Baiza thought the employees were comfortable with Guzman. There was no further evidence to suggest that Guzman played a more active role in organizing, or that the Petitioner held Guzman out in such a role, and the Employer does not cite to any facts in its brief other than Guzman's one home visit and his presence at the place of the election. On this limited record, I cannot conclude that the Hearing Officer erred in finding that the Employer failed to meet its burden of establishing the agency status of Guzman. In so rejecting the Employer's arguments, I note that I find their cases cited to be distinguishable. I view the evidence going towards agency in *Bellagio, LLC*, 359 NLRB No. 128 (2013) to be far more substantial and specific than the scant evidence in this record, as the agent involved therein had sought to be a leader in the organizing campaign for a company that he had not worked for at any time surrounding the campaign, attended an organizing meeting, and specifically referenced the union organizer's request for the agent to contact employees (though there was no such request).³ In contrast, Guzman had only recently stopped working for the Employer at the time

³ The Employer cited *Bloomfield Health Care Center*, 352 NLRB 252 (2008), *enfd* 372 Fed. Appx. 118 (2d Cir. 2010). However, that case was decided by a Board that lacked a quorum, and it is not entirely clear to me that the Board actually sided with the employer in that case regarding the alleged agency status of an individual. That said, the facts involved an individual who served as the union's election observer, engaged in leafleting, appeared in literature, drove co-workers to the polls, and generally spoke on behalf of the union. *Bloomfield Health*, *supra* at 256. I consider that a greater evidentiary showing towards agency than is present in this case. As for *Pan-Oston Co.*, 336 NLRB 305 (2001), the Board found that the evidence was insufficient to find an individual was an agent, largely based on the lack of evidence concerning the scope of the purported agent's duties or the principal's representations to third parties concerning the purported agent's authority. As for the Employer's citation to *NLRB v. L & J Equipment Company, Inc.*, 745 F.2d 224 (3rd Cir. 1984), the Third Circuit did not decide the agency status of alleged agents, including an employee who was part of an in-house organizing committee and who spoke to employees waiting in line to vote in the election. Instead, the Third Circuit remanded the case to the Board for that question, and the Board subsequently held that the evidence was insufficient to establish the agency of the employee who allegedly violated the *Milchem* rule. *L & J Equipment Company, Inc.*, 278 NLRB 485, 487-88 (1986).

Thesis Painting, Inc.
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of the election, and the remainder of the evidence going towards his alleged agency is limited to the lone home visit and his presence at the election site. In addition, even assuming Guzman engaged in telephone conversations or visits with employees in support of the Petitioner, the Board has long held that pro-union individuals do not constitute union agents merely on the basis of their "vocal and active union support." *Cornell Forge Co.*, 339 NLRB 733 (2003) (citing *United Builders Supply Co.*, 287 NLRB 1364 (1988)).

As for Raymundo, I similarly cannot conclude that the Hearing Officer erred in reaching the same conclusion. The Employer's argument in favor of Raymundo's alleged status as an agent of the Petitioner appears to entirely be based on Raymundo's wearing of a T-shirt with the Petitioner's logo at some point on the day of the election. As the Hearing Officer notes (and the Employer does not appear to take any issue with), there is no evidence suggesting that Raymundo spoke to any employees on behalf of the Petitioner during the critical period, or was held out by the Petitioner as acting in such a capacity. On this scant evidence, I agree with the Hearing Officer's conclusion that the Employer did not meet its burden of establishing the agency status of Raymundo.

I view the Employer's sixth exception as also going to the Hearing Officer's finding that Raymundo did not engage in objectionable electioneering on the day of the election. Raymundo undisputedly arrived at the polling site wearing a T-shirt with the Petitioner's insignia on it. Based on my review of the record, while several witness accounts confirm that Raymundo wore such a shirt on the day of the election, these witnesses also confirm Raymundo's claim that he changed out of the logoed shirt before the polls opened and into a plain shirt. Based on these facts, I agree with the Hearing Officer's assessment that Raymundo's wearing of a shirt with the Petitioner's logo before the election began would not have substantially impaired the employees' free choice as to require setting aside the election.

With my rejection of the Employer's exceptions concerning the alleged agency of Guzman and Raymundo, I consequently reject the Employer's eighth exception that the Hearing Officer erred by not applying the rules of *Milchem* and *Nathan Katz Realty*. Each of these rules applies to conduct of parties to an election. In accordance with the finding that the Employer failed to establish the agency of either Guzman or Raymundo, such rules are inapplicable. Therefore, I agree that the Hearing Officer analyzed their conduct under the correct standard governing third party conduct. In evaluating electioneering by such third parties, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004) (quoting *Rheem Manufacturing Co.*, 309 NLRB 459, 463 (1992)). I agree with the Hearing Officer's conclusion that the evidence does not meet this standard.

The Employer's ninth exception concerns the Hearing Officer's treatment of evidence regarding Guzman's presence in the vicinity of the polling place. Caceres admittedly did not actually hear anything that Guzman may have said to any employees. The Employer contends that Caceres testified that Guzman was present just outside the clear glass front door near the polling place for an hour while voting was going on, and that the Hearing Officer mischaracterized this testimony. Based on my review of the record I reject the Employer's exception. Caceres testified that Guzman was already present when Caceres arrived around 3:00 p.m., when the polls opened. He further testified that he saw Guzman enter the polling place to

Thesis Painting, Inc.
Case 05-RC-155713

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vote, and that Guzman then spoke to others in the lobby for a little bit and then left. Caceres then testified that around 4:00 p.m., he saw Guzman again in the office through the glass door for less than three minutes. Based on this evidence, I do not conclude that the Hearing Officer mischaracterized Caceres' testimony by construing it as having Guzman in the vicinity of the polling place for only three to four minutes.

I summarily reject the Employer's tenth and eleventh exception concerning the Hearing Officer's credibility resolutions. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the findings. Furthermore, specifically addressing the Employer's tenth exception that the Hearing Officer failed to discredit Guzman's denial of wearing a T-shirt with the Petitioner's logo in the vicinity of the polling place, I conclude that even if the Hearing Officer had discredited Guzman's denial of wearing the shirt, such would not constitute objectionable conduct that warrants setting aside the election.

As for the Employer's twelfth exception that the Hearing Officer erroneously found that even assuming that Guzman was an agent of the Petitioner, his presence within 10 feet from the polling place did not amount to objectionable surveillance, I agree with the Hearing Officer's conclusion that, in the absence of evidence of coercion or other objectionable conduct, an agent of a union being present near a polling site is insufficient to warrant setting aside the election. Based on my review of the record, I find no such evidence of coercion or other objectionable conduct. I find this particular situation to be indistinguishable from *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), *enf'd* 703 F.2d 876 (5th Cir. 1983), where union agents were engaged in electioneering in the parking lot approximately 10 feet from the polling place, but separated by glass doors and not designated as a "no-electioneering zone" by the Board agent conducting the election.⁴ Thus, I reject the Employer's exception.

For the reasons set forth in this Decision and the Hearing Officer's report, I agree with the Hearing Officer's recommendation to overrule these objections.⁵

III. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's Report and recommendations, the exceptions and arguments made by the Employer, and the arguments made by the Petitioner, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit described below.

⁴ The fact that the conduct did not occur in a designated "no-electioneering zone" distinguishes this case from *Nathan Katz Realty*, as well as the type of conduct involved. The Employer's counsel acknowledged at the hearing that there was no "no-electioneering zone" set by the Board agent.

⁵ Accordingly, I reject the Employer's thirteenth exception, a "catch-all" exception that the Hearing Officer's ultimate recommendations are erroneous.

Thesis Painting, Inc.
Case 05-RC-155713

November 2, 2015

IV. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for the International Union of Painters and Allied Trades, AFL-CIO, District Council 51, and that it is the exclusive representative of all the employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by November 16, 2015. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: November 2, 2015

(SEAL)

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201

Exhibit 5



District Council No. 51
4700 Boston Way
Lanham, MD 20706
(301) 918-0182
(301) 918-3177 Fax

ONE VOICE

Representing:
Protective and Decorative
Coatings Applicators
Painters
Decorators
Wall Coverers
Drywall Finishers
Glaziers
Architectural Metal Workers
Glass Workers
Civil Service Workers
Shipyard Workers
Maintenance Workers
Metal Polishers
Metalizers
Bridge Painters
Riggers
Tank Painters
Marine Painters
Containment Workers
Lead Abatement Workers
Sand Blasters
Water Blasters
Sign Painters
Paint Makers

ONE AGENDA

Affiliated Local Unions
Local Union 1
Local Union 368
Local Union 474
Local Union 890
Local Union 963
Local Union 1100
Local Union 1846
Local Union 1937
Local Union 1997

Over 100 Years Serving
Maryland
Virginia
Washington, DC

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO DISTRICT COUNCIL NO 51

November 5, 2015

Via certified mail, return receipt requested

Barbara Spyridakis
7401-D Fullerton road
Springfield, VA 22153

Re: Bargaining Between IUPAT DC 51 and Thesis Painting

Dear Ms. Spyridakis:

As you are likely aware, District Council 51 of the International Union of Painters and Allied Trades ("DC 51") has been certified by the National Labor Relations Board as the bargaining representative for the employees of Thesis Painting.

DC 51 demands bargaining with Thesis Painting. DC 51 is available to bargain on November 16th, 17th, 18th, 20th, and 23rd during the hours of 9 a.m. to 3 p.m.

Also, Thesis Painting, consistent with its good faith bargaining obligation, must maintain the status quo and refrain from making any unilateral changes in mandatory subjects of bargaining. These subjects include, among numerous mandatory subjects of bargaining, wages, hours of employment, and employee benefits. The demand for bargaining and Thesis Painting obligation to maintain the status quo also extends to any disciplinary action contemplated by Thesis Painting.

I look forward to hearing from you by November 13th regarding Thesis Painting availability for bargaining on the above-noted dates.

Thank you.

Yours truly,

Lynn Taylor
IUPAT District council 51
Business Manager/Secretary Treasure
1-301-440-7752 cell
1-301-918-0182 ext 107
ltaylorii@verizon.net

Exhibit 6

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

THESIS PAINTING, INC.,

Employer

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Petitioner.

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Case No. 05-RC-155713

EMPLOYER'S REQUEST FOR REVIEW

Thesis Painting, Inc. ("Thesis" or "the Employer"), by its attorneys, hereby submits its Request for Review of the Regional Director's Decision and Certification of Representative in the above referenced matter, pursuant to Sections 102.67 and 102.69 of the Board's Rules and Regulations.¹ The Regional Director held that the Employer's Objections should be overruled in their entirety, notwithstanding clear evidence of unlawful electioneering and surveillance during the election by union agents that should have required the election to be set aside under *Milchem, Inc.*, 170 NLRB 362 (1968), and/or *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), and related cases. Review should be granted under the criteria set forth in Section 102.67 because the Regional Director's departure from Board precedent raises a "substantial question of law or policy" and because the Regional Director made "clearly erroneous findings" on "substantial factual issues."

¹ The Record on Review is attached as an Appendix to this Request.

I. The Regional Director Clearly Erred In Failing To Find Adan Guzman And/Or Jose Raymundo Were Agents Of The Union.

As will be discussed in greater detail below, the record evidence establishes that two non-employees, Adan Guzman and Jose Raymundo, engaged in improper electioneering and surveillance during the election within 10 feet of the polling area, where employees were waiting in line to vote, and even inside the polling area. The first substantial factual (and legal) question presented by this case is whether these non-employees were agents of the Union. The Regional Director clearly erred in failing to so find. (RD Dec. at 5-6).

As to Guzman's agency status, employee Nelson Caceres credibly testified that Guzman visited the home of another employee, Jose Viera, to solicit an authorization card on behalf of the Union. (Tr. 14-16, 21, 30-31). Viera reported that Guzman showed him his paycheck from the unionized employer where he worked. (Tr. 15). Employee Jose Carranza Arias further testified that Guzman was known to "work for the union." (Tr. 41-42). Guzman in his testimony admitted telling Viera he made more money at the unionized company in order to "help the union." (Tr. 60-61). But he denied working for the union and denied making any pre-election visits to Thesis employees at the behest of the union. (Tr. 57-61). Guzman was contradicted in his claim to have acted alone, however, by the Petitioner's own marketing director (and chief organizer), Mr. Baiza, who admitted that he did enlist Guzman to accompany him ("to come help me") on a home organizing visit to Viera. (Tr. 71-75). From Baiza's testimony and that of the employee witnesses, it is clear that the union clothed Guzman with apparent authority to speak on its behalf and that he did so.

The Regional Director incorrectly characterized the evidence as showing only that Baiza "called Guzman prior to the election because Guzman knows the employees" and that Baiza "only wanted Guzman's help in getting employees to open the door and listen to him" (Baiza).

(RD Dec. at 5). To the contrary, Guzman did more than just get employees to open the door; he spoke to the employees on the union's behalf about how they could make more money working for a unionized contractor. (Tr. 60-61). Guzman engaged in such activity in the union marketing director's presence, at the union's behest, and was thereby clearly clothed with apparent authority to speak for the union. The Regional Director further erred in claiming that the union failed to "hold Guzman out" in an organizing role. (RD Dec. at 5). That is exactly what happened and that is how Guzman was perceived by employees Caceres and Viera – as a union organizer speaking at the behest of the union and on the union's behalf. Again, union marketing director Baiza plainly brought Guzman to visit Viera for the purpose of having Guzman tell the latter *on the union's behalf* that Viera would make more money working for the union. Baiza manifested by his joint presence with Guzman that Guzman was an agent of the Union speaking on the union's behalf. The credited testimony thus established that the union manifested to at least one employee (who told other employees in the small voting unit) that Guzman had apparent authority to speak on the union's behalf. The Regional Director's finding on this critical issue was factually clearly erroneous.

Because of the foregoing erroneous factual findings, the Regional Director erred on a substantial question of law or policy in failing to find Guzman to be the union's agent. The Board has observed that agency principles must be expansively construed, including when questions of union responsibility are presented. *Pratt Towers, Inc.*, 338 NLRB No. 8, slip op. at 12 (2002), citing among other cases *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993). In the latter case, the Board explained that under the Taft-Hartley Amendments to the Act, the common law of agency applies equally to employers and unions alike.² As the

² "Courts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented." *Id.* at 415.

Board in *Pratt Towers* further explained: “[C]ommon law principles of agency incorporate principles of implied and apparent authority,” which is created “through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.” *Id.* at 12.

Thus, whether the specific acts performed were authorized or subsequently ratified by the Union is not controlling; rather, if there is apparent authority or a reasonable basis for the belief that the union has authorized the alleged agent to perform the acts in question, then agency principles impute responsibility to the union. *Bellagio LLC*, 359 NLRB No. 128 (2013) (apparent authority found); *Bloomfield Health Care Center*, 352 NLRB 256 (2008); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984) (apparent authority found where the union allowed pro-union employee to speak on its behalf); *see also NLRB v. L&J Equip. Co., Inc.*, 745 F.2d 224, 233 (3rd Cir. 1984) (holding that agency relationship exists between an employee and a union if “the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on behalf of the union”); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983) (an individual can be held to be a union agent if the union instigated, authorized, solicited, ratified, condoned, or adopted the individual's actions or statements or clothed the individual with apparent authority to act on behalf of the union).

The Regional Director distinguished some of the foregoing cases on their individual facts, but failed to address the agency *standard* described by the Board in these cases as a matter of policy and law. (RD Dec. at 5). In particular, the Regional Director failed to apply correctly the basic agency principle of apparent authority, *i.e.*, whether there was a reasonable basis for Thesis employees to believe that the union authorized Guzman to speak on the union's behalf by enlisting him in its home visits, where he was accompanied by the chief union organizer. Based on the union's own admission to having enlisted

Guzman to make a joint organizing presentation to a Thesis employee at his home, where Guzman spoke on the union's behalf, the agency standard of apparent authority was clearly met and the Regional Director clearly erred in failing to so find.

The Regional Director also erred in relying on the assertion that "pro-union individuals do not constitute union agents merely on the basis of their vocal and active union support." (RD Dec. at 6, citing the Board's holding in *Cornell Forge Co.*, 339 NLRB 733 (2003)). First, in purporting to state the holding of *Cornell Forge* above, it must be observed that the Regional Director improperly changed the key word "employees" in the Board's holding to "individuals." Compare RD Dec. at 6 with 339 NLRB at 733. The actual holding of the case is in fact limited to "prounion employees." *Id.* The difference is quite significant in the present case because it is undisputed that Mr. Guzman was *not* an employee when he made the home visit together with the chief union organizer and spoke on the union's behalf. Guzman was also not an employee when he engaged in unlawful electioneering and surveillance at the polls when the election took place.

In any event, unlike the pro-union employees so described in *Cornell Forge Co.*, 339 NLRB 733 (2003), Guzman's agency status here is not based merely on the basis of his support for the union, but on the fact that Guzman was held out by the union marketing director as having authority to speak for the union on the subject of organizing in a joint home visit. It is this apparent authority that makes Guzman an agent, not merely his support for the union as an employee (which he was not). See also *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976), in which the appeals court found apparent authority and held volunteer members of an in-plant organizing committee to be union agents whose misconduct vitiated the results of an election; see also *Ky. Tenn. Clay Co. v. NLRB*, 295 F.3d 436, 444 (4th Cir. 2002); *NLRB v. Urban Telephone*, 499 F.2d 239, 241 (7th Cir. 1974). The same principles compel a finding of agency here.

For similar reasons, the Regional Director erred in failing to find that non-employee Raymundo was also a union agent. (RD Dec. at 6). Again, Raymundo was no longer employed by the Employer, and he had no legitimate reason to be at the election except that the Union designated him as its observer and thereby vested him with apparent authority to act on its behalf. *Detroit East, Inc.*, 349 NLRB 935, 936 (2007) (“It is well settled that election observers act as agents of the parties that they represent at the election.”). Like Guzman, Raymundo also wore a black shirt communicating a pro-union message and identifying him as one of the union’s agents. Though he took the shirt off at the request of the Board agent, this did not occur until after he was seen wearing it by employees lined up to vote. Raymundo’s role as a non-employee observer on behalf of the Union in and of itself gave him apparent authority to act on the Union’s behalf. The Regional Director failed to address Raymundo’s non-employee status with the Employer or his agency role as the Union’s observer, and again clearly erred in failing to find that he was a union agent at the time of the election.

II. As Agents Of The Union, Both Guzman And Raymundo Clearly Engaged In Electioneering Activity That Violated The *Milchem* Rule, Requiring The Election To Be Set Aside.

Once it is recognized that either Guzman or Raymundo, or both, acted as union agents on election day, it is plain that the *Milchem* rule was violated in this case, and the Regional Director’s holding to the contrary is again clear error on a substantial matter of law and policy. Both Caceres and Carazzo credibly testified that Guzman, who admitted that he had previously resigned his employment and therefore had no justification for being present at the election, nevertheless showed up at the polling area and spent a full hour standing at the front entrance to the Employer’s office, approximately 10 feet from the conference room where the ballot box was located, together with and talking to employees who were waiting in line to vote. (Tr. 14-16). It

is undisputed that all the voters had to pass by Guzman in order to enter the polling area. (*Id.*). He was wearing a black union T-shirt and was separated from the polling area itself only by a glass door through which he was fully visible throughout the hour standing with and talking to employees who were lined up and entering to vote. (*Id.*).

At one point, Guzman himself entered the polling area to cast a (properly) challenged ballot, though he was clearly not eligible to vote, and during the voting process he was seen by Cacares talking to voters in a circus-like atmosphere so crowded and noisy that the Board agent was forced to call for the employees to quiet down. (Tr. 24). Employee Jose Viera reported to Caceres that Guzman was asking him and other employees why they were not returning his phone calls regarding the union, which was itself coercive. (Tr. 15, 23, 29).³

Based on these facts, the Regional Director should have found that union agent Guzman engaged in unlawful electioneering in direct proximity to the polls that required the election to be set aside. The Board has held that “conversation[s] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.” *Milchem* 170 NLRB 362 (1968). *See also Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982) *enfd.*, 703 F. 2d 876 (5th Cir. 1983); *Nathan Katz Realty, LLC v. NLRB*, 251 F. 3d 981, 991-93 (D.C. Cir. 2001). Thus, Guzman’s conversation with Jose Viera within 10 feet of the polling area, while the employees were waiting in line to vote, in and of itself, compels setting aside the election, regardless of what Guzman said. Indeed, the presence of this non-employee union agent in the voting area wearing a union T-shirt constituted

³ The Regional Director made a clear error of fact in upholding the Hearing Officer’s finding that Guzman only stood in proximity to the polls for “only three to four minutes.” (RD Dec. at 6-7). To the contrary, employee Nelson Caceres plainly testified that Guzman and another unidentified union agent were present “almost the whole time of the voting at the glass door within 10 feet of the polls.” (Tr. 16). The “three to four minutes” to which the Regional Director refers was only the time spent by Guzman actually voting and standing inside the office area immediately adjacent to the conference room where the voting took place. (Tr. 24).

impermissible electioneering under the *Milchem* rule. The Regional Director failed properly to apply the *Milchem* rule's strict laboratory conditions approach to electioneering by union agents. *See also Star Expansion*, 170 NLRB at 364-65; *Claussen Baking*, 134 NLRB 111, 112 (1961); *Detroit Creamery Co.*, 60 NLRB 178, 179-80 (1945).

Contrary to the Regional Director's Decision (at 7), the Board's ruling in *Boston Insulated Wire & Cable Co.*, *supra*, 259 NLRB at 1118, does not excuse the misconduct here. In the *Boston* case, there was no testimony that the union electioneering occurred while employees were waiting in line or that the union agents themselves entered the polling area. In fact, the Board made a point of finding that neither of those facts occurred in the *Boston* case, whereas both elements are present here. It is also significant that the employer in the *Boston* case expressly disclaimed any reliance on a strict application of the *Milchem* rule. *See* 259 NLRB 1118, at n.6. There has been no such disclaimer in the present case. Finally, the present case involved a much smaller voting unit than in *Boston Insulated*, meaning that employees were more likely to be intimidated by the presence of multiple union agents, both inside and in close proximity to the polls.⁴

Even if it were appropriate to consider other factors referred to by the Board in *Boston Insulated*, 259 NLRB at 1119, those factors support setting aside the election here. The electioneering here, unlike in *Boston*, was conducted by union agents both inside, adjacent to and extremely close to the voting area and was directed at employees waiting in line to vote. Also unlike *Boston*, the voters were not insulated from the union agents' activity because two of the

⁴ There was also a third union agent present at the vote whose name was not known to Mr. Caceres, and whose actions were ignored by the Regional Director. In combination with the two known agents, the third man contributed to the improper electioneering that required the election to be set aside, particularly in light of the small size of the bargaining unit. The unknown non-employee agent was testified about by Caceres and complained about by another employee named Salvador on the day of the election. (Tr. 28-31).

agents *entered the voting area itself*, one to act as a non-employee observer for the union, and the other for the illegitimate purpose of casting a ballot as a non-employee. No similar activity occurred in *Boston Insulated*, and the Regional Director clearly erred in claiming the facts of that case were “indistinguishable.”

For similar reasons, the Hearing Officer erred by failing to find that Guzman engaged in improper surveillance by stationing himself at the front entrance to the polling area in such a way that all the voters had to pass by him in order to cast their ballots. *See Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001); *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1982); *Performance Measurements Co.*, 148 NLRB 1657, 1659, sup. By 149 NLRB 1451 (1964). In *Performance Measurements*, the Board held that the continued presence of the Employer’s president at a location where employees were required to pass in order to enter the polling place was improper conduct, even though no electioneering occurred. Likewise in *Electric Hose*, a supervisor stood at a section of a plant where employees had to pass in order to reach a voting area, and again the Board held that such conduct without more, constituted unlawful conduct during an election. Based on these precedents, the D.C. Circuit in *Nathan Katz Realty* held that union agents engaged in objectionable conduct when they sat in their car outside a church where voting was being held, such that employees had to pass under the agents’ surveillance in order to reach the polls, even though the union agents engaged in no electioneering. For the same reasons, union agent Guzman engaged in unlawful surveillance in the present case and the election must be set aside.⁵

⁵ Contrary to the Regional Director’s Decision, at 7, n.4, *Nathan Katz* is not distinguishable based on the existence of a no electioneering area in that case. The court did not base its decision on the no electioneering area, but on the fact that the union agents, who sat in their car at a significantly greater distance than occurred here, were positioned in a place where employees had to pass in order to vote. 251 F.3d at 991-3.

Similarly, the Regional Director erroneously found that union observer and agent Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt. (RD Dec. 6-7). To the contrary, the credited testimony established that union observer Raymundo, another non-employee who was not eligible to vote in the election, wore a black union shirt into the voting area until asked by the Board agent to remove it. Still wearing the union shirt, Raymundo then walked by the large group of employees waiting to vote (constituting almost half of the unit), and in this manner communicated his pro-union message to the employees within 10 feet of the voting area prior to changing his shirt and returning to act as the union's observer. This constituted prohibited electioneering inside and in proximity to the polls that required the election to be set aside.

Conclusion

Wherefore, for the reasons set forth above, the Board should grant review and set aside the Regional Director's Decision certifying the results of the election. The election itself should be set aside.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin
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Washington, D.C. 20036
P: 202-772-2526
F: 202-842-0011
mbaskin@littler.com

Attorney for the Employer

November 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Request for Review and Appendix containing the record on review have been served by electronic mail and/or first class mail on the following this 16th day of November, 2015:

Michael S. Melick
Barr & Camens
1025 Connecticut Ave., N.W., Suite 712
Washington D.C., 20036
Attorney for Painters District Council 51

Charles Posner
National Labor Relations Board
100 South Charles St., Suite 600
Baltimore, MD 21201
Charles.posner@nrlrb.gov

/s/Maurice Baskin

Exhibit 7

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THESIS PAINTING, INC.
Employer

and

Case 05-RC-155713

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
DISTRICT COUNCIL 51
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Certification of Representative is denied, as it raises no substantial issues warranting review.¹

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., March 24, 2016

¹ In denying review, we agree with the Regional Director's finding that Adan Guzman was not an agent of the Petitioner, and therefore that his conduct during the election was not objectionable under Milchem, Inc., 170 NLRB 362 (1968). We need not pass on the Regional Director's alternate finding that, even if Guzman were an agent, his conduct would not have violated Milchem. In addition, although Jose Raymundo may have been the Petitioner's limited agent during the election while he served as the Petitioner's observer, see Dubovsky & Sons, Inc., 324 NLRB 1068 (1997), his wearing of a union t-shirt before the election started was not objectionable. See also Larkwood Farms, 178 NLRB 226 (1969)(an observer's mere wearing of campaign insignia is not objectionable).

Exhibit 8



District Council No. 51
4700 Boston Way
Lanham, MD 20706
(301) 918-0182
(301) 918-3177 Fax

ONE VOICE

Representing:
Protective and Decorative
Coatings Applicators
Painters
Decorators
Wall Coverers
Drywall Finishers
Glaziers
Architectural Metal Workers
Glass Workers
Civil Service Workers
Shipyard Workers
Maintenance Workers
Metal Polishers
Metalizers
Bridge Painters
Riggers
Tank Painters
Marine Painters
Containment Workers
Lead Abatement Workers
Sand Blasters
Water Blasters
Sign Painters
Paint Makers

ONE AGENDA

Affiliated Local Unions
Local Union 1
Local Union 368
Local Union 474
Local Union 890
Local Union 963
Local Union 1100
Local Union 1846
Local Union 1937
Local Union 1997

Over 100 Years Serving
Maryland
Virginia
Washington, DC

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO DISTRICT COUNCIL NO. 51

March 28th, 2016

Barbara Spyridakis
7401-D Fullerton Road
Springfield, VA 22153

Via Certified Mail, Return Receipt Requested

RE: Bargaining Between IUPAT DC 51 and Thesis Painting

Dear Ms. Spyridakis:

As you are likely aware, District Council 51 of the International Union of Painters and Allied Trades ("DC 51") has been certified by the National Labor Relations Board as the bargaining representative for the employees of Thesis Painting.

DC 51 demands bargaining with Thesis Painting. DC 51 is available to bargain on April 4th through the 8th, April 11th through the 14th, April 25th, 27th, and 29th.

Also, Thesis Painting, consistent with its good faith bargaining obligation, must maintain the status quo and refrain from making any unilateral changes in mandatory subjects of bargaining. These subjects include, among numerous mandatory subjects of bargaining, wages, hours of employment, and employee benefits. The demand for bargaining and Thesis Painting obligation to maintain the status quo also extends to any disciplinary action contemplated by Thesis Painting.

I look forward to hearing from you by March 31st regarding Thesis Painting availability for bargaining on the above-noted dates.

Thank you

Yours truly,

Lynn Taylor
Business Manager/Secretary Treasurer
(C)301-440-7752
(O)301-918-0182(EXT)107
(E)ltaylorii@verizon.net

Exhibit 9

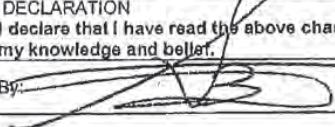
Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

| DO NOT WRITE IN THIS SPACE | |
|----------------------------|------------|
| Case | Date Filed |
| 05-CA-172905 | 3/30/16 |

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

| 1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT | | | |
|---|--|---|------------------------------|
| a. Name of Employer Thesis Painting, Inc. | | b. Tel. No. (703) 440-5900 | |
| | | c. Cell No. | |
| d. Address (street, city, state ZIP code) 7401-D Fullerton Road Springfield, Virginia 22153 | e. Employer Representative Barbara Spyridakis | | f. Fax No. (703) 440-5929 |
| | | g. e-Mail | |
| | | h. Dispute Location (City and State) Springfield, VA | |
| i. Type of Establishment (factory, nursing home, hotel) Construction | j. Principal Product or Service Painting | k. Number of workers at dispute location 40 | |
| l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act. | | | |
| 2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since about November 2, 2015, the Employer has failed and refused to bargain collectively and in good faith with the International Union of Painters and Allied Trades, District Council 51, AFL-CIO, by refusing to meet with employees' certified bargaining representative. | | | |
| 3. Full name of party filing charge (if labor organization, give full name, including local name and number) International Union of Painters and Allied Trades, AFL-CIO, District Council 51 | | | |
| 4a. Address (street and number, city, state, and ZIP code) 4700 Boston Way Lanham, Maryland 20706 | | 4b. Tel. No. | |
| | | 4c. Cell No. 202-716-6297 | |
| | | 4d. Fax No. | |
| | | 4e. e-Mail Sperez63@verizon.net | |
| 5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Union of Painters and Allied Trades, AFL-CIO | | | |
| 6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief. | | Tel. No. | |
| By:  | | Office, if any, Cell No. 202-716-6297 | |
| Sandro Baiza Marketing Representative | | Fax No. | |
| Address: 4700 Boston Way Lanham, Maryland 20706 | | e-Mail 202-716-6297 | |
| Date: 3-30-16 | | | |

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 10

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THESIS PAINTING, INC.

Charged Party

and

**INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51**

Charging Party

Case 05-CA-172905

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on March 31, 2016, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Ms. Barbara Spyridakis
President
Thesis Painting, Inc.
7401-D Fullerton Road
Springfield, VA 22153

Maurice Baskin, Esq.
Littler Mendelson, P.C.
815 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20006

March 31, 2016

Date

Jacqueline Denegal, Designated Agent of
NLRB

Name

/s/ Jacqueline Denegal

Signature

Exhibit 11

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THESIS PAINTING, INC.

and

Case 5-CA-172905

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Thesis Painting, Inc. (Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by the Union on March 30, 2016, and a copy was served on Respondent by U.S. mail on March 31, 2016.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Springfield, Virginia, Respondent's facility, and has been engaged in the business of providing commercial painting services.

(b) In conducting its operations during the 12-month period ending March 31, 2016, a representative period, Respondent performed services valued in excess of \$50,000 in states other than the State of Virginia.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

| | | |
|--------------------------|---|---------------------|
| Angelo Spyridakis | - | Owner and President |
| Bobby Spyridakis | - | Vice-President |
| Jorge Trilla | - | Supervisor |
| Tony (last name unknown) | - | Supervisor |

5. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time painters and lead painters employed by the employer; excluding all estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

6. (a) On July 31, 2015, a representation election was conducted among the employees in the Unit and, on November 2, 2015, the Union was certified as the exclusive collective-bargaining representative of the Unit by the undersigned Regional Director of Region 5.

(b) On November 16, 2015, Respondent submitted a Request for Review of the Regional Director's Decision and Certification of Representative.

(c) On March 24, 2016, the Board denied Respondent's Request for Review of the Regional Director's Decision and Certification of Representative.

(d) At all times since March 24, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

7. About March 28, 2016, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

8. Since about March 28, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

9. By the conduct described above in paragraph 8, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

As part of the remedy for Respondent's unfair labor practices alleged above in paragraph 8, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Charging Party, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before May 12, 2016, or postmarked on or before May 11, 2016.**

Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or

if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on July 6, 2016, at 10:00 a.m., at the Board Hearing Room, Suite 6001, 1015 Half Street, SE, Washington, DC, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Baltimore, Maryland this 28th day of April 2016.

(SEAL)

/s/ CHARLES L. POSNER

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center - Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201

Attachments

Exhibit 12

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

THESIS PAINTING, INC.

and

Case 5-CA-172905

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing
(with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **April 28, 2016**, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

CERTIFIED MAIL NO.
7015 0640 0003 0684 5322

MAURICE BASKIN, ESQ.
LITTLER, MENDELSON, P.C.
SUITE 400
815 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20006

MS. BARBARA SPYRIDAKIS
THESIS PAINTING, INC.
7401-D FULLERTON ROAD
SPRINGFIELD, VA 22153

MR. SERGIO PERIZ
INTERNATIONAL UNION OF PAINTERS AND
ALLIED
TRADES, DISTRICT COUNCIL 51, AFL-CIO
4700 BOSTON WAY
LANHAM, MD 20706

April 28, 2016

Date

Monica Graves
Designated Agent of NLRB

Name

Monica Graves

Signature

Exhibit 13

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD REGION 5

THESIS PAINTING, INC.

and

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51

CASE NOS. 5-CA-172905

RESPONDENT THESIS PAINTING'S ANSWER TO COMPLAINT

Respondent Thesis Painting, Inc. ("Respondent Thesis"), hereby files this Answer to the General Counsel's Complaint, as follows:

1. Without knowledge and therefore denied.
2. (a) Admitted.
(b) Admitted.
(c) Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. (a) Admitted.
(b) Admitted.
(c) Admitted.
(d) Denied.

7. Admitted that the Union requested bargaining. Denied that the Union has been properly certified as the exclusive collective-bargaining representative of the Unit.
8. Admitted that Respondent has refused to recognize and bargain with the Union. Denied that the Union has been properly certified as the exclusive collective-bargaining representative of the Unit.
9. Denied.
10. Denied.

Respondent Thesis denies that the General Counsel and/or the Charging Party are entitled to any of the requested remedies.

AFFIRMATIVE DEFENSES

1. The Complaint is not substantially justified within the meaning of the Equal Access to Justice Act (EAJA).
2. The Complaint is largely redundant with and closely related to the Amended Complaint filed against the Respondent in Case No. 5-CA-167137, including numerous allegations which Respondent has previously answered. Such piecemeal litigation of related unfair labor practices violates Respondent's right to due process and/or constitutes double jeopardy and/or abuse of the Board's processes and is barred on that basis. *See Jefferson Chemical Co.*, 200 NLRB 992 (1972) (and cases citing thereto).
3. The Board's certification of the Charging Party as the representative of the Respondent's employees, and the failure to overturn the results of the election, was invalid, arbitrary, and capricious and departed from precedent without justification, for the reasons stated in Respondent's objections to the election and Request for Review. More specifically, the Board

and Regional Director erred in failing to find that the Union, through its agents, engaged in unlawful surveillance and/or electioneering during the election, and that the individuals who engaged in such improper activity were in fact the Union's agents.

4. The Board's certification of the Charging Party as the representative of the Respondent's employees was also invalid because the election was conducted pursuant to rule changes that were contrary to the Act and arbitrary and capricious in violation of the Administrative Procedure Act, for reasons more fully set forth in the briefs of Appellants in the pending case of *Associated Builders and Contractors v. NLRB*, 15-50497 (5th Cir. appeal pending).

Wherefore, Respondent Thesis is entitled to an Order dismissing the Complaint with prejudice, and/or judgment in its favor, together with an award of attorneys' fees in such amounts as are authorized by the EAJA.

Respectfully submitted,

/s/ Maurice Baskin

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

Attorney for Respondent Thesis

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer to Complaint were served on the following by email and U.S. mail this 17th day of May, 2016:

Mr. Sandro Baiza
International Union of Painters & Allied
Trades, Dist. Council 51, AFL-CIO
4700 Boston Way
Lanham, MD 20706-4311
Charging Party

Charles Posner, Regional Director
NLRB, Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201

/s/ Maurice Baskin_____

Maurice Baskin

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THESIS PAINTING, INC.

and

Case 05-CA-172905

**INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51**

**ORDER TRANSFERRING PROCEEDING TO THE BOARD
and
NOTICE TO SHOW CAUSE**

On May 24, 2016, the General Counsel filed with the National Labor Relations Board a Motion to Transfer Case to the Board and for Summary Judgment, on the ground that the Respondent is attempting to relitigate the issues in Case 05-RC-155713. Having duly considered the matter,

IT IS ORDERED that the above-entitled proceeding be transferred to and continued before the Board in Washington, D.C., and that the hearing scheduled for July 6, 2016 be postponed indefinitely.

NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before June 8, 2016 (with affidavit of service on the parties to these proceedings), why the General Counsel's Motion should not be granted. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., May 25, 2016.

By direction of the Board:

Gary Shinnars

Executive Secretary

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

THESIS PAINTING, INC.,

Respondent

And

**INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES,
AFL-CIO, DISTRICT COUNCIL 51,**

Charging Party.

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Case No. 05-CA-172905

THESIS PAINTING’S RESPONSE TO NOTICE TO SHOW CAUSE

1. Introduction

Thesis Painting, Inc. (“Thesis” or “the Respondent”), by its attorneys, hereby submits its Response to the Board’s May 25, 2016 Notice to Show Cause why the General Counsel’s Motion for Summary Judgment in the above captioned matter should not be granted. This is a “test of certification” case. It is Respondent’s position that the Regional Director improperly overruled the Employer’s Objections to the conduct of the election, and the Board erred in denying Respondent’s Request for Review, in light of clear evidence of unlawful electioneering and surveillance during the election by union agents that should have required the election to be set aside under *Milchem, Inc.*, 170 NLRB 362 (1968), and/or *Nathan Katz Realty v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001), and related cases. Because the certification of the election results was not proper, Thesis has no obligation to bargain with the Petitioner Painters District Council 51 (the “Petitioner” or the “Union”). See *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 226

(D.C. Cir. 1996) (“If [the Union] was improperly certified then [the Employer] did not unlawfully refuse to bargain....”).

The election was held on July 31, 2015. The Respondent timely filed objections and a hearing was held thereon, but the Regional Director overruled the objections and purported to certify the Union on November 2, 2015. The Respondent timely filed a Request for Review of the Regional Director’s Decision and Certification of Representative, but the Board denied the Request for Review on March 24, 2016.

Prior to and during the pendency of Thesis’s Request for Review, the Union filed an unfair labor practice charge in Case No. 5-CA-167137, alleging a refusal to bargain. The Region issued a refusal to bargain complaint and subsequently issued an amended complaint on April 28, 2016, which Respondent answered. That matter is presently scheduled for hearing on July 26, 2016, and raises the same issue presented in this case, along with other related issues.

On or about April 28, the Board also issued the present complaint in Case No. 5-CA-172905, again alleging that Thesis had refused to bargain based on a number of the same allegations as in the previous amended complaint. Respondent answered the present complaint and raised a number of affirmative defenses, including that the Board’s multiple complaints constituted impermissible piecemeal litigation of related unfair labor practice charges violating Respondent’s due process rights, creating double jeopardy, and abusing the Board’s processes. Thesis further answered the present Complaint by asserting that the Board’s certification of the Union as the representative of the Respondent’s employees, and the failure to overturn the results of the election, was invalid, arbitrary, and capricious and departed from precedent without justification, for the reasons stated in Respondent’s objections to the election, briefs to the Region, and Request for Review to the Board. Finally, Thesis challenged the Board’s

certification of the Union because the election was conducted pursuant to rule changes that were contrary to the Act and arbitrary and capricious in violation of the Administrative Procedure Act.

The General Counsel moved for summary judgment, and the Board's Notice to Show Cause followed on May 25, 2016. The General Counsel has not moved for summary judgment of the Amended Complaint in Case No. 5-CA-167137, which remains pending and is scheduled for hearing on July 26, 2016.

Courts have held that it is futile for an employer to provide a detailed restatement of the arguments raised during representation proceedings leading to improper certification of a union, because of the Board's rules prohibiting the re-litigation of representation case matters in a subsequent unfair labor practice proceeding. *See Nathan Katz Realty, LLC v. NLRB*, 251 F.3d at 987. Nevertheless, Thesis is reasserting its previously stated grounds for setting aside the election and certification of the Union, in abridged form, so that it is clear that Respondent is not abandoning its arguments made in the underlying representation case that the Union was improperly certified. *See Best Products Co.*, 765 F.2d 903, 910 (9th Cir. 1985). Thesis hereby reasserts and preserves all arguments, factual assertions and issues raised in its previous filings throughout the underlying representation case and in its Answer to the Complaint, which are incorporated by reference.

Moreover there is a new legal issue present in this case that was not part of the representation proceeding, and which is also asserted in Respondent's Answer: Specifically, Thesis contends that the present Complaint is improperly duplicative of allegations contained in the pending Amended Complaint in Case No. 5-CA-167137. The present Complaint thus constitutes improper piecemeal litigation violative of Respondent's due process rights and the

Board's own procedures and precedent, and should be dismissed on that basis. *See Jefferson Chemical Co.*, 200 NLRB 992 (1972) (and cases citing thereto).

For each of the foregoing reasons, as further stated below and in Respondent's previous filings with the Regional Director and the Board (hereby incorporated by reference), the General Counsel's Motion for Summary Judgment should be denied and the Complaint should be dismissed.

2. The Regional Director And The Board Clearly Erred In Failing To Find Adan Guzman And/Or Jose Raymundo Were Agents Of The Union.

As explained in Respondent's Request for Review, the record evidence establishes that two non-employees, Adan Guzman and Jose Raymundo, engaged in improper electioneering and surveillance during the election within 10 feet of the polling area, where employees were waiting in line to vote, and even inside the polling area. Contrary to the findings of the Regional Director and the Board, the non-employees were agents of the Union.¹ As to Guzman's agency status, employee Nelson Caceres credibly testified that Guzman visited the home of another employee, Jose Viera, to solicit an authorization card on behalf of the Union. (Tr. 14-16, 21, 30-31). Viera reported that Guzman showed him his paycheck from the unionized employer where he worked. (Tr. 15). Employee Jose Carranza Arias further testified that Guzman was known to "work for the union." (Tr. 41-42). The Petitioner's own marketing director (and chief organizer), Mr. Baiza, admitted that he enlisted Guzman to accompany him ("to come help me") on a home organizing visit to Viera. (Tr.71-75). From Baiza's testimony and that of the employee

¹ In denying the Request for Review, the Board reversed the Regional Director's finding that Raymundo was not a Union agent, conceding that Raymundo "may have been the Petitioner's limited agent during the election while he served as the Petitioner's observer." (Req. for Rev., n.1). The case cited by the Board, *Dubovsky & Sons, Inc.*, 324 NLRB 1068 (1997) clearly held that an observer is an agent and representative of the party for whom he observes the election. *See also Detroit East, Inc.*, 349 NLRB 935, 936 (2007) ("It is well settled that election observers act as agents of the parties that they represent at the election.").

witnesses, it is clear that the union clothed Guzman with apparent authority to speak on its behalf and that he did so.

The Regional Director incorrectly characterized the evidence as showing only that Baiza “called Guzman prior to the election because Guzman knows the employees” and that Baiza “only wanted Guzman’s help in getting employees to open the door and listen to him” (Baiza). (RD Dec. at 5). To the contrary, Guzman did more than just get employees to open the door; he spoke to the employees on the union’s behalf about how they could make more money working for a unionized contractor. (Tr. 60-61). Guzman engaged in such activity in the union marketing director’s presence, at the union’s behest, and was thereby clearly clothed with apparent authority to speak for the union. The Regional Director further erred in claiming that the union failed to “hold Guzman out” in an organizing role. (RD Dec. at 5). That is exactly what happened and that is how Guzman was perceived by employees Caceres and Viera – as a union organizer speaking at the behest of the union and on the union’s behalf.

Because of the foregoing erroneous factual findings, the Regional Director and the Board clearly erred in failing to find Guzman to be the union’s agent. The Board’s decision departs from its own precedent without explanation, specifically its previous holdings that agency principles must be expansively construed, including when questions of union responsibility are presented. *Pratt Towers, Inc.*, 338 NLRB No. 8, slip op. at 12 (2002), citing among other cases *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993) (explaining under the Taft-Hartley Amendments to the Act that the common law of agency applies equally to employers and unions alike. *See also Bellagio LLC*, 359 NLRB No. 128 (2013) (apparent agency authority found); *Bloomfield Health Care Center*, 352 NLRB 256 (2008); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984) (apparent

authority found where the union allowed pro-union employee to speak on its behalf); *see also* *NLRB v. L&J Equip. Co., Inc.*, 745 F.2d 224, 233 (3rd Cir. 1984) (holding that agency relationship exists between an employee and a union if “the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on behalf of the union”); *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983) (an individual can be held to be a union agent if the union instigated, authorized, solicited, ratified, condoned, or adopted the individual's actions or statements or clothed the individual with apparent authority to act on behalf of the union).

The Regional Director and the Board failed to apply correctly the basic agency principle of apparent authority, *i.e.*, whether there was a reasonable basis for Thesis employees to believe that the union authorized Guzman to speak on the union's behalf by enlisting him in its home visits, where he was accompanied by the chief union organizer. Based on the union's own admission to having enlisted Guzman to make a joint organizing presentation to a Thesis employee at his home, where Guzman spoke on the union's behalf, the agency standard of apparent authority was clearly met and the Regional Director and the Board erred in failing to so find.

The Regional Director also erred in relying on the assertion that “pro-union individuals do not constitute union agents merely on the basis of their vocal and active union support.” (RD Dec. at 6, citing the Board's holding in *Cornell Forge Co.*, 339 NLRB 733 (2003)). In purporting to state the holding of *Cornell Forge* above, the Regional Director improperly changed the key word “employees” in the Board's holding to “individuals.” *Compare* RD Dec. at 6 *with* 339 NLRB at 733. The actual holding of the case is in fact limited to “prounion *employees*.” *Id.* The difference is quite significant in the present case because it is undisputed that Mr. Guzman was *not* an employee when he made the home visit together with the chief union organizer and spoke

on the union's behalf. Guzman was also not an employee when he engaged in unlawful electioneering and surveillance at the polls when the election took place.

Unlike the pro-union employees so described in *Cornell Forge Co.*, 339 NLRB 733 (2003), Guzman's agency status here is not based merely on his support for the union, but on the fact that Guzman was held out by the union marketing director as having authority to speak for the union on the subject of organizing in a joint home visit. See *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976), in which the appeals court found apparent authority and held volunteer members of an in-plant organizing committee to be union agents whose misconduct vitiated the results of an election; see also *Ky. Tenn. Clay Co. v. NLRB*, 295 F.3d 436, 444 (4th Cir. 2002); *NLRB v. L & J Equip. Co.*, 745 F.2d 224, 235 (3d Cir. 1984); *NLRB v. Urban Telephone*, 499 F.2d 239, 241 (7th Cir. 1974). The same principles compel a finding of agency here.

Like Guzman, Raymundo also wore a black shirt communicating a pro-union message and identifying him as one of the union's agents. Though he took the shirt off at the request of the Board agent, this did not occur until after he was seen wearing it by employees lined up to vote. Raymundo's role as a non-employee observer on behalf of the Union in and of itself gave him apparent authority to act on the Union's behalf.

3. Contrary To The Board and Regional Director's Decisions, Both Guzman And Raymundo Clearly Engaged In Surveillance and/or Electioneering Activity That Violated The *Nathan Katz* and/or *Milchem* Rules, Requiring The Election To Be Set Aside.

Once it is recognized that either Guzman or Raymundo, or both, acted as union agents on election day, it is plain that they engaged in unlawful surveillance and/or electioneering activity. The Board erred in failing to address this issue as to union agent Guzman. Witnesses Caceres

and Carazzo both credibly testified that Guzman, who admitted that he had previously resigned his employment and therefore had no justification for being present at the election, nevertheless showed up at the polling area and spent a full hour standing at the front entrance to the Employer's office, approximately 10 feet from the conference room where the ballot box was located, together with and talking to employees who were waiting in line to vote. (Tr. 14-16). It is undisputed that all the voters had to pass by Guzman in order to enter the polling area. (*Id.*). He was wearing a black union T-shirt and was separated from the polling area itself only by a glass door through which he was fully visible throughout the hour standing with and talking to employees who were lined up and entering to vote. (*Id.*).

At one point, Guzman himself entered the polling area to cast a (properly) challenged ballot, though he was clearly not eligible to vote, and during the voting process he was seen by Cacaes talking to voters in a circus-like atmosphere so crowded and noisy that the Board agent was forced to call for the employees to quiet down. (Tr. 24). Employee Jose Viera reported to Caceres that Guzman was asking him and other employees why they were not returning his phone calls regarding the union, which was itself coercive. (Tr. 15, 23, 29).²

The Board has held that "conversation[s] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election." *Milchem* 170 NLRB 362 (1968). *See also Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982) *enf'd.*, 703 F. 2d 876 (5th Cir. 1983); *Nathan Katz Realty, LLC v. NLRB*, 251 F. 3d 981, 991-93 (D.C. Cir. 2001). The Board and the Regional Director

² The Regional Director made a clear error of fact in upholding the Hearing Officer's finding that Guzman only stood in proximity to the polls for "only three to four minutes." (RD Dec. at 6-7). To the contrary, employee Nelson Caceres plainly testified that Guzman and another unidentified union agent were present "almost the whole time of the voting at the glass door within 10 feet of the polls." (Tr. 16). The "three to four minutes" to which the Regional Director refers was only the time spent by Guzman actually voting and standing inside the office area immediately adjacent to the conference room where the voting took place. (Tr. 24).

departed from this precedent without justification. *See also Star Expansion*, 170 NLRB at 364-65; *Claussen Baking*, 134 NLRB 111, 112 (1961); *Detroit Creamery Co.*, 60 NLRB 178, 179-80 (1945).

Contrary to the Regional Director's Decision (at 7), the Board's ruling in *Boston Insulated Wire & Cable Co.*, *supra*, 259 NLRB at 1118, does not excuse the misconduct here. In the *Boston* case, there was no testimony that the union electioneering occurred while employees were waiting in line or that the union agents themselves entered the polling area. In fact, the Board made a point of finding that neither of those facts occurred in the *Boston* case, whereas both elements were present here. It is also significant that the employer in the *Boston* case expressly disclaimed any reliance on a strict application of the *Milchem* rule. *See* 259 NLRB 1118, at n.6. There has been no such disclaimer in the present case. Finally, the present case involved a much smaller voting unit than in *Boston Insulated*, meaning that employees were more likely to be intimidated by the presence of multiple union agents, both inside and in close proximity to the polls.³

Other factors referred to by the Board in *Boston Insulated*, 259 NLRB at 1119, support setting aside the election here. The electioneering here, unlike in *Boston*, was conducted by union agents both inside, adjacent to and extremely close to the voting area and was directed at employees waiting in line to vote. Also unlike *Boston*, the voters were not insulated from the union agents' activity because two of the agents *entered the voting area itself*, one to act as a

³ There was also a third union agent present at the vote whose name was not known to Mr. Caceres, and whose actions were ignored by the Regional Director and the Board. In combination with the two known agents, the third man contributed to the improper electioneering that required the election to be set aside, particularly in light of the small size of the bargaining unit. The unknown non-employee agent was testified about by Caceres and complained about by another employee named Salvador on the day of the election. (Tr. 28-31). The record evidence thus shows that more than 10% of the total number of voters were non-employees and union agents who tainted the outcome of this election.

non-employee observer for the union, and the other for the illegitimate purpose of casting a ballot as a non-employee. No similar activity occurred in *Boston Insulated*.

Similarly, the Regional Director and the Board erroneously found that union observer and agent Raymundo did not engage in prohibited electioneering when he walked by a line of 10 employees waiting to vote in the election wearing a black union T-shirt. (RD Dec. 6-7). To the contrary, the credited testimony established that union observer Raymundo, another non-employee who was not eligible to vote in the election, wore a black union shirt into the voting area until asked by the Board agent to remove it. Still wearing the union shirt, Raymundo then walked by the large group of employees waiting to vote (constituting almost half of the unit), and in this manner communicated his pro-union message to the employees within 10 feet of the voting area prior to changing his shirt and returning to act as the union's observer. This constituted prohibited electioneering inside and in proximity to the polls that required the election to be set aside. The case cited by the Board in denying the Request for Review, *Larkwood Farms*, 178 NLRB 226 (1969), is distinguishable in that it did not involve multiple non-employee union agents parading past and actually standing in the line of waiting voters while wearing pro-union shirts.

4. The Complaint In This Case and/or in Case No. 5-CA-167137 Should Be Dismissed As Impermissible Piecemeal Litigation

As noted above, on or about the same date on which the Board issued the present complaint in Case No. 5-CA-172905, the Board issued a duplicative and related Amended Complaint in Case No. 5-CA- 167137, again alleging that Thesis had refused to bargain based on a number of the same allegations. The Board's multiple complaints constitute impermissible piecemeal litigation of related unfair labor practice charges violating Respondent's due process rights, creating double jeopardy, and abusing the Board's processes. *See Jefferson Chemical Co.*,

200 NLRB 992 (1972) (and cases citing thereto). To the extent this error is a result of applying the Board's new election rules, then Respondent reiterates that the new rules are unlawful, arbitrary and capricious and have been improperly applied in this case.

Conclusion

Wherefore, for the reasons set forth above, the Board should deny the General Counsel's motion and dismiss the Complaint. The election itself, and the certification of the Union resulting therefrom, should be set aside.

Respectfully submitted,

/s/ Maurice Baskin

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Attorney for the Respondent

June 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to Notice to Show Cause have been served by electronic mail and/or first class mail on the following this 8th day of June, 2016:

Michael S. Melick
Barr & Camens
1025 Connecticut Ave., N.W., Suite 712
Washington D.C., 20036
Attorney for Painters District Council 51

Charles Posner
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Baltimore, MD 21201
Charles.posner@nrlb.gov

/s/Maurice Baskin

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Thesis Painting, Inc. and International Union of Painters and Allied Trades, AFL-CIO, District Council 51. Case 05-CA-172905

July 20, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 30, 2016, by International Union of Painters and Allied Trades, AFL-CIO, District Council 51 (the Union), the General Counsel issued the complaint on April 28, 2016, alleging that Thesis Painting, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 05-RC-155713. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On May 24, 2016, the General Counsel filed a Motion for Summary Judgment. On May 25, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections in the underlying representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate*

Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.¹

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Springfield, Virginia (the facility) and has been engaged in the business of providing commercial painting services.

During the 12-month period preceding March 31, 2016, the Respondent, in conducting its operations described above, performed services valued in excess of \$50,000 in states other than the Commonwealth of Virginia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on July 31, 2015, the Union was certified on November 2, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

¹ The Respondent argues that this complaint constitutes improper piecemeal litigation under *Jefferson Chemical Co.*, 200 NLRB 992 (1972), in view of the amended complaint in Case 05-CA-167137. We reject this argument.

The Board has made clear that [*Jefferson Chemical*] is policy-based, not jurisdictional, and is limited to those instances when the General Counsel attempts to litigate "the same act or conduct as a violation of different sections of the Act" or relitigates the "same charges in different cases."

NLRB v. Community Health Services, Inc., 483 F.3d 683 (10th Cir. 2007), quoting *Service Employees Union, Local 87 (Cresleigh Management, Inc.)*, 324 NLRB 774 (1997). There is no evidence that the General Counsel here seeks to litigate the same conduct in two proceedings. See also *U-Haul Co. of Nevada*, 345 NLRB 1301, 1302 (2005) (holding separate litigation of test-of-certification complaint and complaint alleging discriminatory discharges and failure to bargain about effects of closing facility is within General Counsel's discretion, absent a showing of abuse of discretion or prejudice). In addition, we find that the Respondent's assertions that the complaint is not substantially justified within the meaning of the Equal Access to Justice Act and that the Respondent is entitled to an award of attorney's fees are without merit.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On March 28, 2016, the Union requested in writing that the Respondent recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

Since March 28, 2016, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since March 28, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Thesis Painting, Inc., Springfield, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain with International Union of Painters and Allied Trades, AFL-CIO, District Council 51 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Springfield, Virginia, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

THESIS PAINTING, INC.

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Dated, Washington, D.C. July 20, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Painters and Allied Trades, AFL-CIO, District Council 51 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time painters and lead painters employed by the employer.

EXCLUDED: All estimators, office-clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

THESIS PAINTING, INC.

The Board's decision can be found at www.nlrb.gov/case/05-CA-172905 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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|---------------------------------|---|--|
| THEESIS PAINTING, INC., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | |
| |) | |
| NATIONAL LABOR RELATIONS BOARD, |) | |
| |) | |
| Respondent |) | |

PETITION FOR REVIEW

Petitioner Thesis Painting, Inc. hereby petitions the Court to review and set aside the Decision and Order of the National Labor Relations Board issued against Petitioner in NLRB Case Nos. 05-CA-172905 dated July 20, 2016 and reported at 364 NLRB No. 53. A copy of the Decision and Order is attached, pursuant to Local Rule 15(b). Also attached pursuant to that Local Rule (in the Certificate of Service below) is a list of addresses where respondents may be served with copies of the petition.

Respectfully submitted,

/s/Maurice Baskin
Maurice Baskin
Littler Mendelson, PC
815 Connecticut Ave., N.W., Suite 400
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review have been served in the manner indicated below, this 1st day of August, 2016:

BY HAND DELIVERY:

Linda J. Dreeben, Esq.
Deputy Associate General Counsel
Appellate and Supreme Court Litigation Branch
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Gary Shinnors
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

BY ELECTRONIC AND REGULAR MAIL:

Andrea J. Vaughn, Esq.
Counsel for the General Counsel
NLRB, Region 5
100 South Charles St., Suite 600
Baltimore, MD 21201

Michael Melick
Barr & Camens
1025 Connecticut Ave., N.W., Suite 712
Washington, D.C. 20036
Attorney for Painters District Council 51

/s/Maurice Baskin

Maurice Baskin



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

September 8, 2016

Patricia S. Connor, Esquire
Clerk, United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. U.S. Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219d

Re: *Thesis Painting, Inc. v. NLRB*
4th Cir. No. 16-1871
Board Case No. 05-CA-172905

Dear Mrs. Connor:

I am enclosing the National Labor Relations Board's cross-application for enforcement of its order in this case.

Please serve a copy of the cross-application on the Petitioner, Thesis Painting, Inc., whose address appears on the service list. I have served a copy of the cross-application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of

Appeal: 16-2031 Doc: 2-1 Filed: 09/08/2016 Pg: 2 of 5

any correspondence the Court sends to counsel in this case. The Board attorneys directly responsible for this case are Usha Dheenana, (202) 273-2948 and Molly Sykes, (202) 273-1747.

Very truly yours,

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Encls.

SERVICE LIST

Thesis Painting, Inc. v. NLRB
Board Case No. 05-CA-172905

Maurice Baskin, Esq. Petitioner's Counsel
Littler Mendelson, P.C.
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006

Barbara Spyridakis, President Petitioner
Thesis Painting, Inc.
7401-D Fullerton Road
Springfield, VA 22153

Michael S. Melick, Esq. Charging Party's Counsel
Barr & Camens
1025 Connecticut Avenue, NW, Suite 712
Washington, DC 20036

Sergio Perez, Marketing Representative Charging Party
International Union of Painters and Allied
Trades, AFL-CIO, District Council 51
4700 Boston Way
Lanham, MD 20706

Dennis P. Walsh Regional Director
NLRB Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106-4404

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

| | | |
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| THESIS PAINTING, INC. |) | |
| |) | |
| Petitioner |) | |
| |) | |
| v. |) | No. 16-1871 |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Respondent |) | |

**CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

The National Labor Relations Board hereby cross-applies to the Court for enforcement of its Order issued against Thesis Painting, Inc. on July 20, 2016, in Board Case No. 05–CA–172905, reported at 364 NLRB No. 53. On August 1, 2016, the Petitioner, Thesis Painting, Inc., filed a petition with this Court to review the same Board Order. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this cross-application pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e) and (f)), because the Petitioner is aggrieved by the Board’s order. Venue is proper in this Circuit because the unfair labor practices occurred in Springfield, Virginia.

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 8th day of September, 2016

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

| | | |
|--------------------------------|---|-------------|
| THESIS PAINTING, INC. |) | |
| |) | |
| Petitioner |) | |
| |) | |
| v. |) | No. 16-1871 |
| |) | |
| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Respondent |) | |

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel:

Maurice Baskin, Esq.
Littler Mendelson, PC
815 Connecticut Ave., N.W., Suite 400
Washington, D.C. 20006

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 8th day of September, 2016

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Joint Appendix was served by
ECF on the following this 3d day of October, 2016:

Linda Dreeben
Usha Dheenani
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
usha.deenan@nrlrb.gov

/s/Maurice Baskin